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PAGE

Company.—J. A. Lillie, Advocate 1

Compensation.—[The late Professor Herkless, Glasgow], J. Rodger Haldane, Advocate, Sheriff-Substitute at Stornoway . . 151

Completion of Title.—E. M. Wedderburn, W.S., Professor of Conveyancing in the University of Edinburgh 168

Composition Contract.—D. Mackay Wilson, K.C., Sheriff-Substitute at Oban 248

Compromise.—Margaret H. Kidd, Advocate 255

Compulsory Purchase.—James Keith, K.C. 261

Conditio si sine liberis.—William Mitchell, K.C. 330

Confidential Communications.—D. A. Guild, Advocate . . . 344

Confirmation of Executors.—John Burns, W.S. 360

Confusio.—[C. D. Murray, K.C.], R. P. Morison, Advocate . . . 386

Conjunct Rights.—J. R. Dickson, Advocate 393

Conquest.—[A. V. Begg, W.S.], R. C. Macfarlane, Advocate . . 400

Consolidation.—John Cameron, S.S.C. 407

Constitution, Action of.—J. R. Wardlaw Burnet, Advocate . . 415

Constitutional Law.—D. Oswald Dykes, K.C., Professor of Constitutional Law in the University of Edinburgh 416

Contempt of Court.—T. D. King Murray, Advocate 428

Contract.—Walter T. Watson, K.C. 441

PAGE

COPYRIGHT.—W. BOYD BERRY, Advocate 464

CORPORATION DUTY.—LAWRENCE HILL WATSON, Advocate . . . 536

CORPORATIONS.—T. GRAHAM ROBERTSON, K.C. 541

COUNTY COUNCIL.—T. M. COOPER, K.C. 551

LIST OF CASES CITED.

A. *v.* B. (1617), 443 ; (1626), 178 ; (1676), 401 ; (1747), 166.
A. B. *v.* Binny (1858), 351.
  v. C. D. (1857), 353.
Aaron's Reefs, Ltd. *v.* Twiss (1896), 49, 53, 87.
Aberdeen Master Masons' Incorpn. *v.* Smith (1908), 10, 59.
Aberdeen Rly. Co. *v.* Blaikie (1851), 96, 100.
Aberdeen Steam Navigation Co. (1919), 129.
Aberdeen Town *v.* Strachan (1709), 163.
Acebal *v.* Levy (1834), 449.
Adam (1871), 60.
Adam *v.* Drummond (1810), 181.
  v. Newbigging (1888), 449.
Adams *v.* Thrift (1915), 56.
Adamson's trs. *v.* Adamson's exrs. (1891), 331, 333.
Addie *v.* Western Bank (1865–7), 54, 55, 98.
Addie (Robert) & Sons' Collieries (1916), 45, 46.
Addlestone Linoleum Co., *in re* (1887), 60, 74.
Admiralty *v.* Aberdeen Steam Trawling, etc. Co. (1909), 345, 346, 358, 359.
Advocate, H.M. *v.* Davie (1881), 349, 350.
Advocate, Lord, *v.* Hay (1822), 430.
  v. Huron & Erie Loan, etc. Co. (1911), 115.
  v. Jamieson (1822), 430.
  v. Prentice (1822), 430.
Ager *v.* P. & O. Steamship Co. (1884), 498, 499, 500.
Agnew *v.* British Legal Life Assce. Co. (1906), 104, 133.
Agricultural Hotel Co. (1891), 45.
Aiken *v.* Caledonian Rly. Co. (1913), 547.
Aikman *v.* Caledonian Rly. Co. (1877), 279.
Aitchison *v.* Aitchison (1829), 401, 402.
Aitken's trs. *v.* Rawyards Colliery Co. (1894), 291.
  v. Wright (1871), 341, 342.
Aitkin (1682), 404.
Albert, Prince *v.* Strange (1849), 468.
Alexander *v.* Alexander (1849), 396.
  v. Automatic Telephone Co. (1900), 58, 68, 69, 96.
  v. Bridge of Allan Water Co. (1868), 242, 304, 306.
  v. Mackenzie (1847), 472.
  v. Officers of State (1868), 202.
Alexander *v.* Simpson (1890), 109.
  v. Yuille (1873), 250.
Alexandra Palace Co., *in re* (1882), 123.
Alison *v.* Duncan (1711), 161.
Allan (1826), 429 ; (1884), 366.
Allan, Buckley, etc. *v* Pattison (1893), 253.
Allan *v.* Thomson's trs. (1893), 335, 340, 341 ; (1908), 337.
  v. Wright (1853), 85.
Allen *v.* Gold Reefs of West Africa (1900), 39, 89, 90, 109.
Allison *v.* Scotia Motor & Engineering Co. (1906), 94, 97, 106.
Almada and Tirito Co., *in re* (1888), 74.
Amalgamated Society of Railway Servants *v.* Osborne (1910), 67.
Ambergate, etc. Rly. Co. *v.* Norcliffe (1851), 68.
American Mortgage Co. of Scotland *v.* Sidway (1908), 72.
Ammonia Soda Co. *v.* Chamberlain (1918), 119, 120, 121, 122.
Anderson (1855), 260 ; (1877), 26, 60, 74, 127 ; (1881), 55 ; (1911), 366 ; (1915), 42.
Anderson *v.* Anderson (1677), 401 ; (1828), 198.
  v. Bank of British Columbia (1876), 348, 349.
  v. Connacher (1850), 438.
  v. Deeside Rly. Co. (1853), 274.
  v. Dick (1901), 256.
  v. Lieber Code Co. (1917), 473, 499.
  v. Lord Elgin's trs. (1859), 350.
  v. Marshall (1728), 353.
Anderson & Munro, Ltd., *Petrs.* (1924), 76.
Andrews *v.* Gas Meter Co. (1897), 29, 35, 73, 89, 123.
  v. Mockford (1896), 53.
Anglo-American Land, etc. Co. *v.* Scottish Investment Trust Co. (1896), 65.
Anglo-American Telegraph Co., *in re* (1911), 129.
Anglo-French Co-operative Soc., *in re* (1882), 99.
Annan v. Marshall (1887), 249.
Anthony *v.* Anthony (1919), 359.
Apollinaris and Johannis Co. (1923), 45.
Appleby *v.* Myers (1867), 459.
Arbuckle *v.* Taylor (1815), 357.
Archer's *case* (1892), 92, 100.
Arden Coal Co. (1922), 37.

Argyle, Earl of, *v.* M'Naughton (1671), 210.
Arizona Copper Co. (1900), 39; (1926), 47.
Arizona Copper Co. *v.* London Scottish American Trust (1897), 123.
Arkwright *v.* Newbold (1881), 49, 53, 56.
Arnison *v.* Smith (1889), 53, 55.
Arnot's *case* (1887), 73.
Arrol *v.* Montgomery (1826), 251, 253.
Arthur *v.* Lindsay (1894), 357, 358, 359.
Arthur & Seymour *v.* Lamb (1870), 336, 403.
Artizan's Land and Mortgage Corpn., *in re* (1904), 122.
Ashanti Development, Ltd., *in re* (1911), 37.
Ashbury *v.* Watson (1885), 19, 29, 44.
Ashbury Railway Carriage Co. *v.* Riche (1875), 26, 67, 89, 125, 126, 448.
Ashley's *case* (1870), 54.
Ashton Vale Iron Co. *v.* Bristol Mayor (1901), 272.
Ashurst *v.* Mason (1875), 98, 99.
Asiatic Banking Corpn., *in re* (Royal Bank of India's *case*), 1869, 136.
Asiatic Petroleum Co. *v.* Anglo-Persian Oil Co. (1916), 359.
Asphaltic Limestone Concrete Co. *v.* Glasgow Corpn. (1907), 135, 455.
Assets Co. *v.* Guild (1885), 127, 256.
Astley *v.* Manchester, etc. Rly. Co. (1858), 309.
  v. New Tivoli, Ltd. (1899), 103.
Athole Hydro. Co. *v.* Scottish Provincial Assce. Co. (1886), 146.
Atholl, Duke of, *v.* Dalgleish (1823), 438.
  v. Robertson (1872), 436.
Atkins & Co. *v.* Wardle (1889), 28.
Atlantic Patent Fuel Co., *in re* (1917), 132.
Atlas Co. *v.* Fullerton (1853), 500.
Att.-Gen. *v.* Anglo-Argentine Tramways (1909), 33.
  v. Briant (1846), 357.
  v. Caledonian Rly. Co. (1911), 33.
  v. De Keyser's Royal Hotel (1920), 262.
  v. Great Eastern Rly. Co. (1880), 125, 138.
  v. Kissane (1892), 430.
  v. London City Corpn. (1913), 536.
  v. Nottingham Corpn. (1904), 359.
  v. Regent's Canal and Dock Co. (1904), 77.
Australasian Mortgage, etc. Co. *v.* Inland Revenue (1888), 148.
Australian Estates and Mortgage Co., *re* (1910), 36.
Australian Mortgage, etc. Co. (1880), 27.
Australian Mutual Provident Co. (1908), 28.
Automatic Self-cleaning Filter Syndicate *v.* Cunninghame (1906), 96.
Avery (John) & Co., Ltd. (1890), 40.
Aveson *v.* Lord Kinnaird (1805), 354.
Ayr County Council *v.* Paterson (1906), 570.
Ayr Harbour trs. *v.* Oswald (1883), 268, 288.
Ayr Presbytery (1842), 297.

Babcock *v.* Lawson (1879), 449.
Badische Anilin und Soda Fabrik *v.* Basle Chemical Works (1898), 497.
  v. Hickson (1906), 497.
Bagge *v.* Miller (1920), 502.
Bahama Islands (1893), 430.
Bahia and San Francisco Rly. Co., *in re* (1868), 78, 80.
Bailey *v.* Isle of Thanet Light Rlys. Co. (1900), 287.
  v. Taylor (1829), 473.
Baillie *v.* Oriental Telephone Co. (1915), 139.
  v. Young (1837), 252.
Baily *v.* British Equitable Assce. Co. (1904), 90.
  v. De Crespigny (1869), 460.
Bain (1903), 365.
Bain *v.* Whitehaven and Furness Junction Rly. Co. (1850), 63.
Bainbridge *v.* Smith (1889), 92, 103.
Baird (1903), 297, 301.
  v. Dundee Mags. (1865), 545.
Baird's *case* (1899), 68.
Baird's trs. (1882), 298.
Balaghat Gold Mining Co., Ltd., *in re* (1901), 64.
Bald *v.* Buchanan (1786), 386, 407.
Balfour *v.* Balfour (1919), 442.
Balfour's trs. *v.* Edinburgh and Northern Rly. Co. (1848), 139.
Balfour-Melville's trs. *v.* Gowans (1896), 387, 390.
Balkis Consolidated Co. *v.* Tomkinson (1893), 78.
Ballachulish Slate Quarries *v.* Black (1908), 143.
  v. Malcolm (1908), 143.
  v. Menzies (1908), 143, 144.
Balmenach-Glenlivet Distillery (1916), 37, 40, 42, 43, 259.
Balmenach-Glenlivet Distillery *v.* Croall (1906), 44.
Balmerino, Lord, *v.* Dick's crs. (1664), 152.
Bank Line *v.* Capel & Co. (1919), 458.
Bank of Hindustan *v.* Alison (1870), 72.
Bank of Ireland *v.* Evan's trs. (1855), 133.
Bank of Scotland *v.* Faulds (1870), 250, 251.
Bank of South Australia *v.* Abrahams (1875), 143.
Banknock Coal Co., Ltd. (1897), 43, 44.
Bannatyne *v.* Direct Spanish Telegraph Co. (1886), 45.
Banner, *ex parte* (1881), 256.
Baptist Church General Assembly *v.* Taylor (1841), 476.
Bargaddie Coal Co. *v.* Wark (1859), 452.
Bargate *v.* Shortridge (1851), 81.
Barker *v.* North Staffordshire Rly. Co. (1848), 305.

Barned's Banking Co., *in re* (1867), 58, 133.
Barnett *v.* South London Tramways Co. (1887), 105.
Barnton Hotel Co., Ltd. *v.* Cook (1899), 106.
Barony Parish Council *v.* Glasgow School Board (1895), 311.
Barrow *v.* Potter (1914), 91.
Barrow's *case* (1880), 106.
Barstow *v.* Graham (1843), 245.
    v. Stewart (1858), 221, 224.
Bartilmo *v.* Hassington (1632), 395.
Bartlett *v.* Mayfair Property Co. (1898), 68.
Barton Water Co., *in re* (1889), 6.
Barwick *v.* English Joint Stock Bank (1867), 97, 104, 133.
Baschet *v.* London Illustrated Standard Co. (1900), 475.
Baskett *v.* Cunningham (1762), 478.
Bastros *v.* White (1876), 349.
Batchelor *v.* Pattison & Mackersy (1876), 257.
Bateman, *in re* (1852), 298.
Bath's exrs. (Lady) *v.* Johnstone (1812), 348.
Beal, *ex parte* (1868), 504.
Bear Island Defence Works, *in re* (1903), 303.
Beaton *v.* Glasgow Corpn. (1908), 546.
Beatson *v.* Skene (1860), 356, 358.
Beattie *v.* Roxburgh (1672), 403.
Beattons *v.* Gaudie (1832), 169.
Bechuanaland Exploration Co. *v.* London Trading Bank (1898), 145.
Beckett *v.* Midland Rly. Co. (1867), 285.
Beckwith, *ex parte* (1898), 94.
Bede Steam Shipping Co., *in re* (1917), 83.
Beeton & Co., *in re* (1913), 488.
Begbie *v.* Begbie (1706), 401.
Bell *v.* Belfast Corpn. (1914), 304.
    v. Carruthers (1749), 203.
    v. City of Glasgow Bank (1879), 61, 84.
    v. Gartshore (1737), 235.
    v. Glen (1883), 381.
    v. Whitehead (1839), 501.
Bell Bros., Ltd., *in re* (1891), 82, 83.
Bell's trs. *v.* Coatbridge Tinplate Co., Ltd. (1886), 70.
Bellerby *v.* Rowland & Marwood's Steamship Co. (1902), 39, 86, 88.
Benhar Coal Co. (1879), 84.
Benhar Coal Co., Ltd. liqrs. (1882), 69.
Bennett's *case* (1855), 96.
Benson *v.* Heatham (1842), 100.
Bentinck *v.* Fenn (1887), 100, 101.
    v. London Joint Stock Bank (1893), 145.
Bentley (Henry) & Co., *in re* (1893), 59.
Bergmann *v.* Macmillan (1881), 512.
Berkeley's Will, Earl of, *in re* (1874), 299.
Bertrams *v.* Hodge (1810), 166.
Berwick's exr. (1885), 341.
Best's *case* (1865), 60.
Betson *v.* Lord Grange (1628), 350.
Betts *v.* Great Eastern Rly. Co. (1878), 309.
Bevan *v.* Webb (1901), 64.
Beveridges *v.* Beveridges' trs. (1878), 397.
Bigg's *case* (1865), 86.
Biggerstaff *v.* Rowatt's Wharf (1896), 26.
Birmingham Banking Co. (1867), 115.
Birn *v.* Keen (1918), 506.
Bisgood *v.* Henderson's Transvaal Estates, Ltd. (1908), 129, 141.
Bishop *v.* Balkis Consolidated Co. (1890), 78.
    v. Bryce (1910), 445.
Bishop of Natal, *in re* (1864), 424.
Bisset *v.* Walker (1799), 222, 398.
Black *v.* Formartine, etc. Rly. Co. (1861), 304.
    v. Homersham (1878), 80.
    v. Murray (1830), 474.
    v. Murray & Son (1870), 472, 499, 500.
    v. Valentine (1844), 338.
    v. Williams (John) & Co. (1924), 442.
Blackburn & Co. *v.* Pearson, Ltd. (1915), 472, 473.
Blackpool Corpn. *v.* Starr Estate Co. (1922), 312.
Blackwell *v.* Harper (1740), 483.
Blackwood *v.* Colvil's and Russell's reprs. (1740), 220.
Blaikie *v.* Coats (1893), 54, 55, 65.
Blair Open Hearth Furnace Co. (1914), 58.
    v. Reigart (1913), 91.
Blair's exrs. *v.* Taylor (1876), 331, 335, 336, 337, 339, 340, 341.
Blair's trs. (1852), 297.
Blakiston *v.* London and Scottish Banking, etc. Corpn. (1894), 53, 55, 65.
Blantyre (Lord) *v.* Caledonian and Dumbartonshire, etc. Rly. Co. (1853), 267.
    v. Dumbarton Waterworks Commrs. (1888), 264.
    v. Dunn (1845), 438 ; (1858), 387, 389, 390.
Bloe *v.* Bloe (1882), 433.
Bloomenthal *v.* Ford (1897), 77.
Bloxam's *case* (1860), 59.
Blumer & Co. *v.* Scott & Sons (1874), 454.
Blyth's *case* (1876), 77.
Blyth's trs. *v.* Milne (1905), 124.
Blythswood *v.* Glasgow and South-Western Rly. Co. (1914), 300.
Boag *v.* Gillies (1832), 357.
Bodega Co., Ltd., *in re* (1904), 103.
Bogie's trs. *v.* Christie (1882), 339, 340.
Bogle *v.* Ballantine (1793), 162.
Bognall *v.* Carlton (1877), 12.
Bogue *v.* Houlston (1852), 483.
Bohn *v.* Bogue (1846), 500.
Bolivia Exploration Syndicate (1914), 117.
Bolton & Co., *in re* (1894), 93.
Bolton *v.* London Exhibitions (1898), 496.
Bond *v.* Barrow Hæmatite Co. (1902), 41, 120, 121, 122.

Bonelli's Telegraph Co. (1871), 102.
Bones *v.* Morrison (1866), 380.
Bonnewell *v.* Jenkins (1878), 445.
Bontine *v.* Graham and ors. (1837), 410, 413.
Boosey *v.* Fairlie (1877), 481, 502.
  v. Wright (1900), 474, 502, 516.
Booth *v.* Blacks (1831), 339.
  v. New Africander Gold Mining Co. (1903), 31.
  v. Richards (1910), 495.
Bootham Ward Strays, York., *in re* (1892), 538.
Borough Commercial and Building Soc., *in re* (1893), 39.
Borthwick *v.* Lord Borthwick (1668), 391.
  v. Scottish Widows' Fund (1864), 160.
Boschoek Proprietary Co. *v.* Fuke (1906), 94.
Boston Deep Sea Fishing and Ice Co. *v.* Ansell (1888), 100.
Boswell *v.* Glasgow and South-Western Rly. Co. (1851), 268.
Bouch *v.* Sproule (1887), 121, 124.
Boucicault *v.* Delafield (1863), 471.
Boustead *v.* Gardner (1879), 394.
Bower *v.* Russel (1810), 347, 348.
Bowman *v.* Richter (1900), 341, 342.
Boyd *v.* Boyd (1774), 401, 402.
  v. King's Advocate (1749), 393.
  v. Lanarkshire Commrs. (1876), 556.
Bradbury *v.* Beeton (1869), 475.
Bradbury, Agnew & Co. *v.* Day (1916), 504.
Bradford *v.* Young (1884), 397.
Bradford Banking Co. *v.* Briggs (1886), 25, 71.
Bradley *v.* London and North-Western Rly. Co. (1850), 273.
Bradshaw *v.* Air Council (1926), 315, 316.
Braintree and Bocking Gas Co., *in re* (1920), 128, 131.
Branksea Island Co., *in re* (1890), 96.
Brash's trs. *v.* Phillipson (1916), 396.
Bray *v.* Ford (1896), 100.
Brazilian Rubber Plantations and Estates, *in re* (1911), 101.
Breadalbane, Earl of, *v.* Macdougall (1880), 179.
Breadalbane, Marquis of, *v.* West Highland Rly. Co. (1895), 268, 289.
Brebner *v.* Henderson (1925), 97, 137.
Bremner (1881), 366.
Brenes & Co. *v.* Downie (1914), 99.
Bridge of Allan Water Co. *v.* Alexander (1868), 264, 265, 304, 311.
Bridger's *case* (1869), 87; (1870), 60.
Bridgewater, Navigation Co., *in re* (1889), 123.
Bridport Old Brewery Co., *in re* (1867), 112.
Briggs, *ex parte* (1866), 54.
British American Metal Corpn. *v.* O'Brien (1927), 148.
British and American Trustee Co. *v.* Couper (1894), 38, 39, 43, 44, 88.
British Asbestos Co. *v.* Boyd (1903), 96.
British Assets Trust (1913), 37.
British and Burmese Steam Navigation Co. (1879), 44.
British Equitable Assce. Co. *v.* Baily (1904), 71.
British Legal Life Assce., etc. Co. *v.* Pearl Life Assce. Co. (1887), 104, 127, 133.
British Motor Body Co. *v.* Thomas Shaw (Dundee), Ltd. (1914), 153.
British Murac Syndicate *v.* Alperton Rubber Co. (1915), 71, 90, 91.
British Mutual Banking Co. *v.* Charnwood Forest Rly. Co. (1887), 106.
British Seamless Paper Box Co., *in re* (1881), 20, 100.
British South Africa Co. *v.* De Beers Consolidated Mines (1910), 25, 460.
British Vacuum Cleaner Co. *v.* New Vacuum Cleaner Co. (1907), 27.
British Waggon Co., etc. *v.* Lea & Co. (1880), 455.
Briton Medical and General Life Assce. Co. (1888), 63.
Broad *v.* Pitt (1828), 353.
Broadbent *v.* Imperial Gas, etc. Co. (1857), 285.
Broatch (1878), 429.
Brock *v.* Cabbell (1830), 244.
Broemel *v.* Mayer (1912), 474.
Brookes *v.* Hansen (1906), 51.
Broome *v.* Speak (1903), 51.
Brough *v.* Adamson (1887), 394.
Brown (1865), 371.
Brown (John) Ltd., *in re* (1914), 128, 129, 130, 132.
Brown *v.* British Abrasive Wheel Co. (1919), 90, 110.
  v. Campbell (1855), 401, 402.
  v. Elies (1686), 154.
  v. Foster (1857), 350.
  v. Hastie (1912), 237.
  v. Hay (1897), 358.
  v. M'Intyre (1830), 249, 251.
  v. Millar (1853), 370.
  v. North British Rly. Co. (1906), 309.
  v. Smith (1676), 235.
  v. Stewart (1898), 96, 110, 114, 139.
Brown's *case* (1873), 92, 93.
Browns *v.* Kilsyth Police Commrs. (1886), 89, 95, 136.
Browne (1882), 236.
Browne *v.* La Trinidad (1887), 25, 26.
Brownlie *v.* Miller (1878), 55.
Brownrigg Coal Co. *v.* Sneddon (1911), 140.
Bruce *v.* Carstairs (1770), 410.
Bruce-Henderson *v.* Henderson (1790), 394.
Bruce Peebles & Co. *v.* Bain & Co. (1918), 259.

Brussel's Theatre of Varieties Ltd. *v.* Prockter (1893), 32.
Bryan *v.* Butters (1892), 444.
Bryce's tr. (1878), 336, 337, 340, 341.
Bryson *v.* Caledonian Rly. Co. (1894), 270.
    v. Watson (1893), 394.
Buccleuch, Duke of, *v.* Metropolitan Board of Works (1870), 285; (1872), 279.
Buchan *v.* City of Glasgow Bank (1879), 84.
Buchan's *case* (1879), 67.
Buchanan (1864), 297.
Buchanan *v.* Caledonian Rly. Co. (1850), 268.
    v. North British Rly. Co. (1905), 301.
Bulawayo Market and Offices Co., *in re* (1907), 90.
Bullivant *v.* Att.-Gen. for Victoria (1901), 351.
Bunbury *v.* Bunbury (1839), 349.
Burdett Coutts, *ex parte* (1927), 442.
Burgh-Smeaton *v.* Whitson and ors. (1907), 169.
Burke *v.* Burke (1904), 298.
Burkinshaw *v.* Nicolls (1878), 78.
Burland *v.* Earle (1902), 25, 93, 96, 110, 122, 123, 124, 139.
Burnet *v.* Burnet (1766), 388.
    v. Nasmith (1693), 389, 390.
Burns *v.* North British Rly. Co. (1863), 125.
    v. Siemens Bros. Dynamo Works (1919), 65.
Burrell *v.* Burrell's trs. (1916), 163.
Burrowes *v.* M'Farquhar's trs. (1842), 393.
Burrows *v.* Matabele Gold Reefs (1901), 31.
Burton *v.* Bevan (1908), 75, 76.
Bury *v.* Famatina Development Co., Ltd. (1909), 74.
Bush *v.* Trowbridge Waterworks Co. (1875), 285, 289.
Bush's *case* (1870), 83.
Bushby *v.* Rennie (1825), 396, 397.
Bute, Marquis of (1847), 297; (1892), 98.
Butterworth *v.* Robinson (1901), 501.
Bwllfa, etc. Collieries *v.* Pontypridd Waterworks (1903), 293.
Byrne *v.* Statist Co. (1914), 472, 488, 497, 507.
    v. Van Tienhoven (1880), 450.

Cable *v.* Mark (1882), 474.
Cackett *v.* Keswick (1902), 51, 56.
Cadell *v.* Allan (1905), 170.
Cadell & Davies *v.* Stewart (1804), 467, 469.
Caird *v.* Sime (1885), 467, 470, 471, 477.
Calcraft *v.* Guest (1898), 348.
Calcutta Jute Co. *v.* Nicholson (1876), 7, 8, 27.
Calder *v.* Borthwick (1829), 253.
Calderwood *v.* Courtie (1681), 355.
Caldwell *v.* Caldwell (Papermakers), Ltd. (1916), 41, 42, 44, 45.
Caledonian Heritable Security Co. *v.* Curror's trs. (1882), 99.
Caledonian Insce. Co. *v.* Matheson's trs. (1901), 460.
Caledonian Rly. Co. *v.* Barr (1855), 273, 280, 286.
    v. Barr's trs. (1871), 269.
    v. Carmichael (1870), 278.
    v. City of Glasgow Union Rly. Co. (1869), 269, 297, 309, 545.
    v. Colt (1860), 287.
    v. Davidson (1903), 308.
    v. Fleming (1869), 312.
    v. Glasgow Corpn. (1901), 289.
    v. Glasgow and South-Western Rly. Co. (1903), 268.
    v. Henderson (1876), 292.
    v. Jackson (1895), 270.
    v. Lockhart (1849), 274; (1860), 275, 287.
    v. M'Bride (1891), 286.
    v. Morrison (1898), 280.
    v. Ogilvy (1855), 279, 286.
    v. Symington (1913), 347.
    v. Turcan (1898), 268, 270, 278, 288.
    v. Walker's trs. (1882), 286, 287.
    v. Watt (1875), 258, 269, 271, 284.
Calgary and Edmonton Land Co. (1906), 41.
California Redwood Co. (1885), 112.
California Redwood Co. liqrs. *v.* Walker (1886), 9.
Callander (1903), 365.
Calley *v.* Richards (1854), 349.
Callon *v.* Shanks (1851), 250.
Cameron *v.* Charing Cross Rly. Co. (1864), 268.
    v. Glenmorangie Distillery Co. (1896), 127.
    v. Young (1837), 394.
Cammell, *ex parte* (1894), 93.
Campbell's *case* (1873), 33, 109.
Campbell *v.* Ayr County Council Northern Dist., Cte. (1904), 244, 302, 322.
    v. Blair (1897), 55.
    v. Campbell (1738), 404; (1781), 154; (1823), 350; (1917), 12.
    v. Edinburgh and Glasgow Rly. Co. (1855), 269, 278.
    v. Falconer (1891), 368.
    v. Hall (1774), 420.
    v. Little (1823), 154.
    v. Maitland (1893), 357.
    v. Maund (1836), 111.
    v. Scott (1842), 500.
Campbell's trs. *v.* Campbell (1889), 398.
    v. Dick (1915), 339.
Campbell (A. & A.), *v.* Campbell's exrs. (1900), 445.
Canada North-Western Land Co. (1885), 47.
Canning *v.* Farquhar (1886), 450.
Cantiere San Rocco *v.* Clyde Shipbuilding, etc. Co. (1923), 457, 458.
Cape Breton Co., *in re* (1885), 100.
Capel & Co. *v.* Sim's Composition Co. (1888), 56.

Cappon *v.* Lord Advocate (1919), 356.
Caratal (New) Mines, Ltd., *in re* (1920), 112, 113.
Carbon (New) Syndicate *v.* Seton (1904), 9.
Cardiff Corpn. *v.* Cook (1923), 269.
Cargill *v.* Baxter (1829), 153.
  v. Bower (1878), 97.
Carington *v.* Wycombe Rly. Co. (1866), 310, 311 ; (1868), 268.
Carlill *v.* Carbolic Smoke Ball Co. (1893), 450.
Carling's *case* (1875), 100.
Carlton Hotel Co. *v.* Lord Advocate (1921), 546.
Carlton Illustrators *v.* Coleman (1911), 510.
Carmichael *v.* Caledonian Rly. Co. (1870), 275.
  v. Carmichael (1719), 156.
  v. City of Glasgow Bank (1879), 63, 66.
Carnegie *v.* MacTier (1844), 390, 391.
Carpmael *v.* Powis (1846), 348.
Carriage Co-operative Supply Assoc., *in re* (1884), 99, 100.
Carrick and ors. (1885), 66.
Carron Co., The (1910), 28.
Carron Co. *v.* Henderson's trs. (1896), 451, 542.
  v. Hunter (1868), 122.
  v. Maclaren (1855), 7, 8.
Carse (1784), 435.
  v. Russel (1717), 401.
Carslaw *v.* M'Alpine & Sons (1899), 303.
Carter *v.* Great Eastern Rly. Co. (1863), 304.
Carter's trs. *v.* Carter (1892), 339.
Cartmell's *case* (1874), 106.
Cary *v.* Kearsley (1802), 499.
Cassilis *v.* Bargeny (1682), 178.
Catchpole, *in re* (1852), 86.
Caterham Urban Council *v.* Godstone Rural Council (1904), 561.
Cathcart *v.* Earl of Cassilis (1807), 199, 203.
Cawley & Co., *in re* (1889), 68, 69, 80, 83, 102, 113.
Cedar Rapids Manufacturing, etc. Co. *v.* Lacoste (1914), 287.
Central Railway Co. of Venezuela *v.* Kisch (1867), 48, 52.
Cescinsky *v.* Routledge & Sons, Ltd. (1916), 512.
Ceylon Land and Produce Co., Ltd., *in re* (1893), 82, 83.
Chalmers' trs. *v.* Watson (1860), 380.
Chambers *v.* Edinburgh and Glasgow Aerated Bread Co. (1891), 53, 55, 65.
Champion *v.* Duncan (1867), 403.
Chancellor *v.* Mosman (1872), 341.
Chandler *v.* Webster (1904), 458.
Chandler's Wiltshire Brewery Co., *in re* (1903), 287.
Chant *v.* Brown (1852), 348.
Chapleo *v.* Brunswick Permanent Bldg. Soc. (1887), 142.
Chaplin (1926), 301.
Chapman's *case* (1866), 105.
Chapman *v.* Smethurst (1909), 97, 137, 138.
  v. Sulphite Pulp Co., Ltd. (1892), 60.
Chappell *v.* Associated Radio Co. of Australasia (1925), 503.
  v. Davidson (1855), 475.
  v. Sheard (1855), 475.
Charlton, *in re* (1836), 430.
Charlton *v.* Rolleston (1885), 300.
Chatterton *v.* Cave (1878), 501.
  v. India in Council, Secretary of State for (1895), 359.
Cherry, *in re* (1862), 264.
Chida Mines Ltd. *v.* Anderson (1905), 105.
Chinnock *v.* Marchioness of Ely (1865), 445.
Cholmondeley, Lord, *v.* Lord Clinton (1815), 348.
Christeneville Rubber Estates (1911), 54.
Christian *v.* Corren (1716), 425.
  v. Kennedy (1818), 353.
Christie *v.* Birrells (1910), 153.
  v. Caledonian Rly. Co. (1894), 301.
  v. Craig (1900), 358.
  v. Fife Coal Co. (1899), 256.
  v. Keith (1838), 152, 165.
  v. Paterson (1822), 337.
  v. Ruxton (1862), 85.
  v. Taunton, Delmard, Lane & Co. (1893), 69.
Chubb *v.* Solomons (1852), 355.
Citizens Life Assce. Co. *v.* Brown (1904), 104, 133, 547.
City Equitable Fire Insce. Co., *in re* (1925), 97, 98, 99, 116, 117.
City of Edinburgh Brewery Co. *v.* Gibson's tr. (1867), 69.
City of Glasgow Bank (1880), 9, 102.
  v. Geddes' trs. (1880), 260.
  v. Mackinnon (1882), 98, 100, 123.
  v. Mitchell (1879), 59.
  v. Muir (1878), 61.
City of Glasgow Union Rly. Co. *v.* Caledonian Rly. Co. (1871), 266, 309.
  v. Hunter (1870), 278, 279, 286, 287.
  v. M'Ewen & Co. (1870), 269, 308.
City Property Investment Trust (1896), 41.
City Property Investment Trust Corpn. *v.* Thorburn (1897), 29, 121.
Civil Engineers, Institution of, *in re* ; Forrest (1890), 538.
Claridge's Patent Asphalte Co., *re* (1921), 101.
Clark (1829), 429 ; (1839), 437 ; (1885), 367.
Clark (J. T.) & Co., Ltd. (1911), 43, 44, 111, 112, 113.
Clark *v.* Bishop (1872), 480.
  v. City of Glasgow Union Rly. Co. (1868), 274.
  v. Hinde, Milne & Co. (1884), 146.
  v. London School Board (1874), 271.
  v. Spence (1824), 348.
  v. Stirling (1839), 434, 438.

Clark *v.* West Calder Oil Co. (1882), 144, 146, 149, 244.
  v. Workman, (1920), 96.
Clarke's *case* (1878), 77.
Clarke *v.* Hart (1858), 70, 86.
Clavering, Son & Co. *v.* Goodwins, Jardine & Co. (1891), 77, 105.
Cleland *v.* Stevenson (1669), 152.
Clement *v.* Maddick (1859), 475.
Clerk *v.* Russell (1825), 253.
Clerkington, Lady, *v.* Stewart (1664), 401.
Clinton's Claim (1908), 134, 135.
Clippens Oil Co. *v.* Edinburgh and Dist. Water trs. (1887), 292; (1897), 289; (1901), 291; (1906), 352.
Clough *v.* London and North-Western Rly. Co. (1871), 54.
Cloves *v.* Staffordshire Potteries Water Co. (1872), 289.
Clyde Football Co. (1900), 105, 106.
Clyde *v.* Glasgow City and District Rly. Co. (1885), 287.
Clydesdale, Marquis of, *v.* Dundonald (1726), 178.
Coalport China Co., *in re* (1895), 83.
Coasters, Ltd., *in re* (1911), 77.
Coats (J. & P.) (1900), 128.
Coats *v.* Caledonian Rly. Co. (1904), 269, 270, 271.
Cobb *v.* Becke (1845), 106.
Cobden *v.* Kenrick (1791), 349.
Cochrane *v.* City of Glasgow Bank (1879), 66.
Cockburn's trs. *v.* Dundas (1864), 338.
Codrington *v.* Johnston's trs. (1824), 387, 388.
Cole *v.* Handasyde & Co. (1910), 455.
Coleraine Rural District Council, *in re* (1903), 298.
Collen *v.* Wright (1857), 97.
Collier *v.* Collier (1833), 398.
Collins *v.* Donald (1895), 111.
  v. North British Bank (1850), 118.
Colmer (James) Ltd. (1897), 42.
Colonial Bank *v.* Whinney (1886), 72, 78, 81.
Colquhoun *v.* Campbell (1829), 331, 334.
  v. Walker (1867), 180.
Colquhoun's tr. *v.* British Linen Co. (1900), 55, 65.
Colvile's trs. *v.* Marindin (1908), 220, 388.
Commercial Bank of South Australia, *in re* (1886), 8.
Commonwealth (Kentucky) *v.* Sapp (1890), 354.
Concessions Trust, *in re* (1896), 78.
Connell *v.* River Clyde trs. (1845), 269.
Connell's trs. *v.* Connell (1872), 236.
Con Planck Co. *v.* Kolynos Incorpn. (1925), 486.
Consett Iron Co., *in re* (1901), 129.
Consett Waterworks Co. *v.* Ritson (1889), 292.
Consolidated Copper Co. of Canada liqr. *v.* Peddie (1877), 60, 92.
Consolidated Nickel Mines, Ltd., *in re* (1914), 95.
Consort Deep-Level Gold Mines Ltd., *in re* (1897), 32.
Constable & Co. *v.* Brewster (1824), 475.
Cook *v.* Barry, Henry & Cook, Ltd. (1923), 96.
  v. Deeks (1916), 110, 139.
Cooke *v.* Maxwell (1817), 356.
Coope *v.* Ridout (1921), 446.
Cooper *v.* Metropolitan Board of Works (1883), 347.
  v. Stephens (1895), 495.
Cooper & Wood *v.* North British Rly. Co. (1863), 287.
Copal Varnish Co., *in re* (1917), 66, 83.
Corbet *v.* Hamilton (1707), 166.
Cork Employers' Federation (1921), 132.
Cormack *v.* Anderson (1829), 244.
Correlli *v.* Gray (1913), 502.
Corrie *v.* MacDermott (1914), 287.
Cotman *v.* Brougham (1918), 19, 126, 127.
Cotton (1875), 366.
County Life Assce. Co., *in re* (1870), 136.
County of Gloster Bank *v.* Rudery & Co. (1895), 26.
Coustonholm Paper Mills Co., Ltd., liqr. *v.* Law (1891), 73.
Couturier *v.* Hastie (1856), 449.
Coutts (Burdett), *ex parte* (1927), 442.
Coventry *v.* London, Brighton and South Coast Rly. Co. (1867), 310.
Cowan (1910), 365.
  v. Gowans (1877), 60, 69, 152, 165.
  v. O'Conner (1888), 60.
  v. Scottish Publishing Co. (1892), 112, 113.
  v. Shaw (1878), 69, 165.
Cowie *v.* Muirden (1893), 226.
Cowper and ors., *Petrs.* (1897), 384.
Cowper Essex *v.* Acton Local Board (1889), 279.
Cox *v.* Land and Water Journal Co. (1869), 473.
Craddock Bros. *v.* Hunt (1923), 256.
Craig *v.* Cochran (1838), 179.
  v. North British Rly. Co. (1888), 358.
Craigie *v.* Aberdeenshire Commrs. (1879), 556.
Craigola Merthyr Co. *v.* Swansea Corpn. (1927), 294.
Cranston (1890), 363.
Cranston's Tea Rooms, Ltd. (1919), 44.
Crauford *v.* Coutts (1806), 335.
Crawford *v.* Hotchkiss (1809), 388.
Crawford's trs. (1886), 341.
Crawfurd *v.* Caledonian Rly. Co. (1904), 301.
Crawley's *case* (1869), 60.
Credit Assurance and Guarantee Corpn. (1902), 43, 45.
Crédit Foncier of England (1871), 46.

Cree *v.* Somervail (1879), 61, 127.
Cresswell Ranche and Cattle Co. *v.* Balfour-Melville (1901), 70.
Creyke's *case* (1869), 87.
Crichton's tr. *v.* Howat (1890), 336, 341.
Crichton's trs. *v.* Wood (1798), 210.
Crickmer's *case* (1874), 74, 78.
Crooke *v.* Scots Pictorial Co. (1906), 486.
Crookston *v.* Lindsay, Crookston & Co. (1922), 90.
Crookston Bros. *v.* Inland Revenue (1911), 8.
Crossley (John) & Sons, *re* (1892), 40.
Crouch *v.* Crédit Foncier of England (1873), 79.
Croudace *v.* Annandale Steamship Co. (1925), 453.
Crow *v.* Cathro (1903), 332, 334.
Crown Bank, the (1890), 28.
Cubbison *v.* Cubbison (1724), 178.
Cullen *v.* Thomson & Kerr (1862), 106.
  v. Thomson's trs. (1862), 97.
Cullerne *v.* London, etc. Permanent Bldg. Soc. (1890), 99.
Cuming *v.* Irvine (1726), 388.
Cumming's trs. *v.* Anderson (1895), 397.
Cumstie's trs *v.* Cumstie (1876), 395.
Cuninghame *v.* City of Glasgow Bank (1879), 85.
Cuninghame, Stevenson & Co. *v.* Wilson & Co. (1809), 167.
Cunliff's trs. *v.* Cunliff (1900), 124.
Cunliffe Brooks & Co. *v.* Blackburn and District Benefit Bldg. Soc. (1884), 141, 142, 143.
Cunningham *v.* Edinburgh and Northern Rly. Co. (1847), 284.
  v. Glen (1812), 202.
Cunningham & Co., *in re* (1887), 137.
Cunninghame (Smith) *v.* Anstruther's trs. (1869), 394.
Cunninghame *v.* Cardross (1680), 388.
  v. Haldane (1754), 218.
Curror's trs. *v.* Caledonian Heritable Security Co. (1880), 60.
Cyclists' Touring Club, *in re* (1907), 128, 130.

D'Almaine *v.* Boosey (1835), 501, 502.
Dafen Tinplate Co. *v.* Llanelly Steel Co. (1920), 90.
Dahl *v.* Nelson, Donkin & Co. (1881), 458.
Dale *v.* Plant, Ltd. (1890), 94.
Dalgleish *v.* Land Feuing Co., Ltd. (1885), 61.
  v. Stirling, etc. Rly. Co. (1847), 304.
Dalhousie, Earl of, *v.* Lady Hawley (1712), 199.
  v. Lord Hanley (1713), 389.
Dalton Time Lock Co. *v.* Dalton (1892), 74, 77.
Daly *v.* Palmer (1868), 501.
Dalzell *v.* Dennistoun (1876), 258.
Dand (1904), 375.
Da Prato *v.* Partick Mags. (1907), 583.
Davidson *v.* Clark (1867), 415.
  v. M'Leod (1847), 174.
Davidson's tr. *v.* Urquhart (1892), 157.
Davidson's trs. *v.* Caledonian Rly. Co. (1894), 270, 290, 308.
  v. Ogilvie (1910), 492.
Davies *v.* Benjamin (1906), 473, 483.
  v. Comitti (1885), 474.
  v. Gas Light and Coke Co. (1909), 64, 118.
  v. James Bay Rly. (1914), 292.
Davison *v.* Gillies (1889), 120.
Dawson *v.* African Consolidated Land, etc. Co. (1898), 96.
  v. Dawson (1877), 396.
Day *v.* Tait (1900), 105.
De Beers Consolidated Mines, Ltd. *v.* Howe (1906), 8.
De Berenger *v.* Wheble (1819), 483.
De la Rue (Thomas) & Co., *in re* (1911), 40, 44.
Delfe *v.* Delamotte (1857), 506.
Delvoitted & Co. *v.* Baillie's tr. (1877), 351.
Dempsters *v.* Raes (1873), 256.
Denham & Co., *in re* (1883–4), 99, 100, 101, 115, 123.
Denman *v.* Torry (1899), 364.
Dennison *v.* Fea's trs. (1873), 390.
Denniston *v.* Macfarlane (1808), 221.
Dennistoun *v.* Dennistoun's tr. (1863), 258.
Dennistoun's trs. *v.* Caledonian Rly. Co. (1900), 305.
Denver Hotel Co., *in re* (1893), 41.
Dermaline Co. *v.* Ashworth (1905), 97, 138.
Derry *v.* Peek (1889), 53, 55.
De Ruvigne's *case* (1877), 92, 100.
Development Company of Central West Africa, *in re* (1902), 41.
De Vitre *v.* Betts (1873), 506.
Devlin *v.* Lowrie (1922), 395, 398.
De Waal *v.* Adler (1886), 80.
Dewar *v.* Ainslie (1892), 256, 445.
  v. M'Kinnon (1825), 394, 396.
Dexine Patent Packing, etc. Co. (1903), 40.
Dey *v.* Pullinger Engineering Co. (1921), 26, 138.
Dicido Pier Co., *in re* (1891), 42, 44.
Dick *v.* Murison (1845), 251.
Dickens *v.* Lee (1844), 501.
Dicks *v.* Brooks (1880), 493, 504.
  v. Yates (1881), 474.
Dickson *v.* Dickson (1780), 397.
  v. Lord Elphinstone (1802), 177.
  v. Syme (1801), 210.
Dickson's trs. (1889), 298.
Diggens *v.* Gordon (1865), 403, 404.
Discoverer's Finance Corpn., Ltd., *re* (1910), 80.
Dixon *v.* Dixon (1841), 338, 341.
Dixon, Ltd. *v.* Caledonian Rly. Co. (1880), 292.
Dixon's trs. *v.* Deucher (1918), 338.

Dobbie *v.* Edinburgh and Glasgow Bank Directors (1861), 98.
Dobie *v.* Lauder's trs. (1873), 256.
  v. M‘Farlane (1856), 258.
Dobie's trs. *v.* Pritchard (1887), 332, 333, 334.
Dodds *v.* Cosmopolitan Insce. Corpn., Ltd. (1915), 84.
Dodsley *v.* Kinnersley (1761), 501.
Doecham Gloves, Ltd., *re* (1913), 36.
Doloswella Rubber and Tea Estates Co., *in re* (1917), 35, 41, 42.
Dominion of Canada General Trading, etc. Syndicate *v.* Brigstocke (1911), 31.
Don *v.* North British Rly. Co. (1878), 271.
Don Fishing Co. (1916), 47.
Donald *v.* Hart (1844), 357, 358, 359.
Donaldson *v.* Becket (1774), 467.
  v. Ord (1855), 144.
Donaldson's trs. *v.* Forbes (1839), 390, 391.
Dornan *v.* Lanarkshire County Council (1916), 579.
Douglas *v.* Caledonian Rly. Co. (1848), 269.
  v. MacLachlan (1881), 258.
  v. Sharpe (1811), 396.
  v. Somerville (1713), 182.
  v. Thomson (1870), 396.
Douglas's exrs. (1869), 331, 336, 337, 340, 341.
Dovey *v.* Cory (1901), 41, 97, 98, 99, 117, 119, 120, 122, 123.
Dowgray *v.* Gilmour (1907), 359.
Dowie *v.* Dowie (1728), 404.
Dowling and Welby's Contract, *re* (1895), 67.
Downie's trs. (1901), 338.
Drew *v.* Lumsden (1865), 3.
Drummond *v.* Drummond (1793), 181.
Drybrough & Co. *v.* Roy (1903), 452.
Dryburgh (1878), 371.
Du Barre *v.* Livette (1791), 349.
Dublin, etc. Rly. Co. *v.* Navan, etc. Rly. Co. (1871), 268.
Duck *v.* Tower Galvanizing Co. (1901), 26.
Ducks *v.* Bates (1884), 502, 504.
Dudgeon (1862), 374.
Dudgeon *v.* Thomson (1876), 437.
Dudley Corpn., *in re* (1881), 290.
Duff (1863), 297.
Duffy's Estate, *in re* (1897), 310.
Duke *v.* Andrews (1848), 60.
Dumbarton Mags. (1852), 297.
Dumbarton Water Commrs. *v.* Lord Blantyre (1884), 312.
Dumbartonshire County Council *v.* Clydebank Police Commrs. (1893), 566.
Dumfriesshire County Council *v.* Phyn (1895), 579.
Dunbar, heirs of Earl of (1625), 401.
Duncan (1889), 375.
  v. Salmond (1874), 257.
Duncanson (T. & R.) *v.* Scottish County Investment Co. (1915), 454.
Dundas *v.* Dundas (1823), 204, 396 ; (1837), 364.
  v. West Highland Rly. Co. (1902), 275.
Dundas's tr. *v.* Forth Bridge Rly. Co. (1884), 272.
Dundee Suburban Rly. (1904), 415.
Dumfermline, Earl of, *v.* Earl of Callender (1676), 394.
Dumfermling, Lady, *v.* Earl of Dumfermling (1628), 404.
Dunhill *v.* North-Eastern Rly. Co. (1896), 310.
Dunlop *v.* Dunlop (1882), 71, 86.
  v. Higgins (1848), 450.
Dunlop Pneumatic Tyre Co. (1902), 8.
  v. Dunlop Motor Co. (1907), 27, 28.
Dunmore, Countess of, *v.* Alexander (1830), 450.
Dunn *v.* Banknock Coal Co. (1901), 91.
Dunnett *v.* Mitchell (1885), 149.
Dunoon Picture House Co. *v.* Dunoon Mags. (1921), 436.
Dunsmore *v.* Lindsay (1903), 582.
Dunsmure *v.* Dunsmure (1879), 365.
Dunster's *case* (1894), 93.
Dunston *v.* Imperial Gas Light Co. (1832), 93.
Durham's trs. *v.* Graham (1798), 210.
Dutton *v.* Marsh (1871), 137.
Dykes *v.* Boyd (1813), 397.

Eadie *v.* Glasgow Corpn. (1908), 3, 544.
Eagle *v.* Charing Cross Rly. Co. (1867), 288.
Eaglesfield *v.* M. of Londonderry (1876), 53.
Eaglesham *v.* Grant (1875), 253.
Earl *v.* Vass (1822), 357.
Easson *v.* Thomson's trs. (1879), 365.
East *v.* Bennett Bros. (1911), 110.
East and West India Docks, etc. Co. and Bradshaw, *re* (1848), 274.
East India Docks, etc. Rly. Act, *in re* (1848), 300.
Eastburn *v.* Wood (1892), 582.
Eastern Counties Rly. Co. *v.* Marriage (1860), 307.
Ebbw Vale Steel, etc. Co. (1877), 38.
Eddington (1913), 367.
Eddystone Marine Insurance Co. (1893), 74.
Edelstein *v.* Schuler & Co. (1902), 145.
Eden *v.* North Eastern Rly. Co. (1907), 293.
Edgar *v.* Kennedy & Hutton's tr. (1905), 258.
  v. Maxwell (1738), 199.
Edinburgh American Land Mortgage Co. *v.* Lang's trs. (1909), 259.
Edinburgh and District Water Trustees *v.* Clippens Oil Co. (1898), 292, 293 ; (1900), 290 ; (1902), 278.
Edinburgh and Glasgow Rly. Co. *v.* Monklands Rly. Co. (1850), 268.
Edinburgh and Leith Glass Co. *v.* North British Rly. Co. (1862), 276.

- Edinburgh Correspondent Newspaper (1882), 475.
- Edinburgh Employers' Liability, etc. Co. *v.* Griffiths (1892), 84.
- Edinburgh Entertainments, Ltd. *v.* Stevenson (1925), 140.
- Edinburgh Mags. (1777), 210.
  - *v.* Lorimer (1914), 269, 272.
  - *v.* North British Rly. Co. (1904), 290.
- Edinburgh Northern Tramways Co. *v.* Mann (1891–6), 62, 81, 100, 107, 139.
  - *v.* Rixon (1889), 134; (1890), 95, 134.
- Edinburgh, Perth and Dundee Rly. Co. (1850), 305.
  - *v.* Hope (1854), 305.
  - *v.* Leven (1852), 276.
  - *v.* Philip (1857), 267.
- Edinburgh Southern Cemetery Co. (1923), 128, 129, 130, 132.
- Edinburgh Tailors *v.* Muir's tr. (1912), 547.
- Edinburgh Tramways Co. *v.* Black (1873), 265.
- Edmond (1829), 431.
  - *v.* Aberdeen Mags. (1855), 170, 244.
- Edmondstone *v.* Edmondstone (1861), 446.
- Edward *v.* Shiell (1840), 396.
- Egremont, Lord, *in re* (1848), 298.
- Eichbaum *v.* City of Chicago Grain Elevators, Ltd. (1891), 88.
- Elder *v.* English and Scottish Law Life Assce. Co. (1881), 346, 354.
  - *v.* Watson (1859), 389.
- Elder's trs. *v.* Elder (1894), 331, 332, 334.
- Eley *v.* Positive Government Security Life Assce. Co. (1876), 25, 26, 104, 107.
- Elgin County Council *v.* Elgin Mags. (1897), 562.
- Elgin Mags. *v.* Highland Rly. Co. (1884), 243, 282, 283, 302.
- Eliason *v.* Henshaw (1819), 450.
- Elibank, Lord (1857), 301.
- Elibank *v.* Campbell (1833), 409, 410, 413.
- Elkington's *case* (1867), 60.
- Elliot *v.* Elliots (1711), 163.
- Elliott *v.* Bax-Ironside (1925), 97, 137.
- Ellis *v.* Marshall & Son (1894), 486.
- Emanuel *v.* Bridger (1874), 149.
- Emma Silver Mining Co. *v.* Grant (1879), 12.
- Emmanuel *v.* Symon (1908), 9.
- Empress Engineering Co., *in re* (1880), 454.
- English and Colonial Produce Co. (1906), 15, 16.
- English's Coasting and Shipping Co. *v.* British Finance Co. (1886), 140.
- Erlanger *v.* New Sombrero Phosphate Co. (1887), 12, 13, 14.
- Erneslaw's crs. *v.* Douglases (1705), 394.
- Ernest *v.* Loma Gold Mines, Ltd. (1897), 111.
  - *v.* Nicholls (1857), 136.
- Errington *v.* Metropolitan Rly. Co. (1881), 290, 292.
- Erskine *v.* Aberdeen Rly. Co. (1851), 300.
  - *v.* Glendinning (1871), 445, 446, 457.
- Erskine *v.* Hamilton (1710), 235.
- Erskine Macdonald, Ltd. *v.* Eyles (1921), 494.
- Esparto Trading Co., *in re* (1879), 86.
- Etheridge *v.* Central Uruguay, etc. Rly. (1913), 141.
- Eupion Fuel and Gas Co., *in re* (1875), 101.
- Evan's *case* (1867), 59.
- Evans *v.* Brunner, Mond & Co. (1921), 126.
  - *v.* Chapman (1902), 90.
- Evling *v.* Israel & Oppenheimer, Ltd. (1918), 122, 123.
- Ewan *v.* Watt (1828), 397, 398.
- Exchange Telegraph Co. *v.* Central News (1897), 468, 473.
  - *v.* Gregory & Co. (1896), 468.
- Express Engineering Works, *in re* (1920), 110, 112.

- Fairservice *v.* Whyte (1789), 210.
- Falcon *v.* Famous Players Film Co. (1926), 471, 496.
- Falconer *v.* Aberdeen Rly. Co. (1853), 266, 271, 274, 276, 279, 280.
- Falkner *v.* Somerset, etc. Rly. Co. (1873), 307.
- Falls *v.* Belfast, etc. Rly. Co. (1849), 307.
- Falmouth, Lord, *v.* Moss (1822), 352.
- Farie *v.* Farie's Tutor (1920), 293, 298.
- Farmer *v.* Elder (1683), 210.
- Farquharson *v.* Kelly (1900), 337, 340, 342.
- Faure Electric Accumulator Co., *in re* (1889), 32, 96, 98.
- Fead *v.* Maxwell (1709), 394.
- Fenning Film Service, Ltd. *v.* Wolverhampton, etc. Cinemas, Ltd. (1914), 481.
- Fenwick, Stobart & Co., *in re* (1902), 105.
- Ferguson (1900), 365.
  - *v.* Central Halls Co., Ltd. (1881), 68, 69, 86.
  - *v.* Ferguson (1663), 401.
  - *v.* Ferguson (1875), 223.
  - *v.* Hood (1881), 279, 280, 308.
  - *v.* Officers of State (1749), 415.
  - *v.* Wilson (1866), 90, 97.
- Ferguson's Curator Bonis (1905), 432.
- Ferguson's trs. *v.* Hamilton (1860), 396, 397.
- Fergusson *v.* M'George (1739), 393.
- Fernandez, *ex parte* (1861), 433.
- Ferrand *v.* Bradford Corpn. (1856), 285, 289
- Ferrar *v.* Sewers of London Commrs. (1869), 264.
- Ferrier *v.* British Linen Co. (1807), 166.
- Fife and Kinross Rly. Co. *v.* Deas (1859), 266, 276, 284.
- Fife Linoleum, etc. Co. liqrs. *v.* Lornie (1906), 94, 95.
- Filby *v.* Hounsell (1896), 446.
- Finance and Issue, Ltd. *v.* Canadian Produce Corpn., Ltd. (1905), 75, 76.
- Finburgh *v.* Moss Empires (1908), 104, 133.
- Findlay *v.* M'Intyre (1849), 397.
  - *v.* Waddell (1910), 118.
- Findlay's trs. *v.* Findlays (1886), 334.

Fine *v.* Edinburgh Life Assce. Co. (1909), 166.
Finlay *v.* Glasgow Corpn. (1915), 346.
  v. Morgan and ors. (1770), 209.
Finlayson *v.* Ross's tr. (1829), 154.
Finnie *v.* Glasgow and South-Western Rly. Co. (1857), 454.
Firbank's exrs. *v.* Humphreys (1886), 97, 142.
Fireproof Doors, Ltd., *re* (1916), 102, 114.
First National Re-Assce. Co. *v.* Greenfield (1921), 54.
Fisher (1885), 60.
  v. Bontine (1827), 350.
  v. Dixon (1833), 398.
  v. Edgar (1894), 433.
  v. Great Western Rly. Co. (1911), 275.
Fisher's trs. *v.* Fisher (1844), 393.
Fitzgerald *v.* Persse (1908), 147.
Fitzhardinge *v.* Gloucester Canal Co. (1872), 275.
Fleming (1798), 337, 340.
  v. Caledonian Rly. Co. (1847), 304.
  v. Imrie (1868), 387, 390.
  v. Lanarkshire Middle Ward Dist. Cte. (1895), 280.
  v. Newport Rly. Co. (1883), 280, 287.
  v. Wilson (1823), 252.
Fletcher, *ex parte* (1867), 60.
  v. Birkenhead Corpn. (1907), 289.
  v. Eglinton Chemical Co. (1886), 138.
Flitcroft's *case* (1882), 99, 100, 119, 123.
Floating Dock Co. of St. Thomas, Ltd. (1895), 42.
Florence *v.* Lawson (1851), 355.
Florida Mortgage and Investment Co. liqr. *v.* Bayley (1890), 66, 84.
Fogo *v.* Colquhoun (1867), 355.
Fooks *v.* Wilts., etc. Rly. Co. (1846), 304.
Foote *v.* Hayne (1824), 348.
Forbes *v.* Caledonian Rly. Co. (1886), 301.
  v. Gracie (1901), 358.
  v. Maitland (1754), 199, 201.
Forbes, Lord, *v.* Garrioch (1673), 179.
Forbes, Hunter & Co. (1802), 388.
Forbes tr. *v.* Ogilvy (1904), 157.
Forde's *case* (1885), 74.
Forest of Dean Coal Mining Co., *in re* (1878), 96, 98.
Forfar, etc. Rly. Co. *v.* Bell (1892), 281.
Forget *v.* Cement Products Co. of Canada (1916), 59.
Forkes *v.* Weir (1897), 430.
Forrest (1890), 538 ; (1904), 365.
  v. Forrest (1863), 393, 415.
  v. Macgregor (1913), 358.
Forrester's trs. *v.* Forrester (1894), 340, 341.
Forslind *v.* Bechely-Crundall (1922), 457.
Forsyth (1900), 365.
  v. Turnbull (1887), 365.
Forteith *v.* Earl of Fife (1821), 349.
Forth and Clyde Junction Rly. Co. *v.* Ewing (1864), 269, 276.
Forth Marine Insce. Co. *v.* Burnes (1848), 104.
Fortune *v.* Edinburgh Rly. Co. (1849), 306.
Fortune Copper Mine of Western Australia (1870), 8.
Foss *v.* Harbottle (1843), 25, 26, 96, 139.
Foster *v.* Coles (1906), 123.
  v. Foster (1916), 91.
  v. New Trinidad Lake Asphalt Co. (1901), 121.
Foster, Alcock & Co. *v.* Grangemouth Dockyard Co. (1886), 352.
Foucar & Co., Ltd., *re* (1913), 37.
Fowler *v.* Brown (1916), 167.
Fowlie *v.* M'Lean (1868), 443.
Francis, *ex parte* (1903), 509.
Francis, Day & Hunter *v.* Feldman & Co. (1914), 471.
Fraser *v.* Brown (1707), 397.
  v. Caledonian Rly. Co. (1911), 282, 283, 302.
  v. Carruthers (1875), 388.
  v. City of Glasgow Bank (1880), 93, 95, 127, 139.
  v. Fraser (1687), 403.
  v. Fraser's trs. (1897), 347, 354.
  v. Fraserville (City of) (1917), 287.
  v. Malloch (1895), 350.
  v. Robertson (1881), 156.
Fraser's Judicial Factor (1892), 374.
Freeland *v.* Finlayson (1823), 253.
Freeman *v.* Cooke (1848), 442.
Freemasons, Grand Lodge of, *v.* Inland Revenue (1912), 538.
French (1871), 374.
French Tubeless Tyre Co., *in re* (1900), 113.
Friend *v.* London, Chatham and Dover Rly. Co. (1877), 347.
Frog's crs. *v.* His Children (1735), 223, 395.
Frost and Reed *v.* Olive Series Publishing Co. (1908), 505.
Fullarton *v.* Hamilton (1833), 182.
Fuller *v.* Blackpool Winter Gardens (1895), 481.
  v. Glyn, Mills, Currie & Co. (1914), 79.
Furness & Co. *v.* Cynthiana S.S. Co. liqrs. (1893), 66, 74, 78, 83, 85.
Furniss *v.* Midland Rly. Co. (1868), 270.

GADD *v.* Houghton (1876), 104.
Gairns *v.* Sandiland (1671), 394.
Galashiels Mags. *v.* Selkirk County Council (1896), 576.
Galashiels Masonic Hall (1911), 65.
Galbraith (1889), 381.
  v. Graham (1814), 414.
Galdie *v.* Gray (1774), 162.
Gall *v.* Murdoch (1821), 165.
Galloway *v.* Grant (1851), 331.
  v. Hallé Concerts Soc. (1915), 69.
  v. London Corpn. (1866), 268.
Galloway, Earl of, *v.* Dalry Minister, etc. (1810), 541.

Galloway Saloon Steam Packet Co. *v.* Wallace (1891), 62, 93.
Gammell *v.* Cathcart (1849), 173.
Garden Gully United Quartz Mining Co. *v.* M'Lister (1875), 69, 86.
Garden Village (Hull), Ltd., *re* (1923), 36.
Gardner *v.* Charing Cross Rly. (1861), 270.
  v. Iredale (1912), 21, 108.
  v. London, Chatham and Dover Rly. Co. (1867), 6.
  v. Scott (1839), 181.
Garner *v.* Garner (1920), 353.
Garnock S.S. Co., Ltd. (1895), 43.
Garpel Haematite Co. *v.* Andrew (1866), 27.
Gaselee, *in re* (1901), 300.
Gaslight International Co. *v.* Farrell (1870), 96.
Gatling Gun, Ltd. (1890), 45.
Gauld's trs. *v.* Duncan (1877), 340, 341.
Gavin *v.* Montgomerie (1830), 349.
Geipel *v.* Peach (1917), 56.
  v. Smith (1872), 458.
Gelly Deg Colliery Co., *re* (1878), 122.
General Accident Assce. Corpn. (1906), 132.
General Auction Estate Co. *v.* Smith (1891), 127, 141.
General Billposting Co. *v.* Atkinson (1909), 104, 105.
General Property Investment Co. *v.* Craig (1891), 39, 87, 88, 127.
  v. Matheson's trs. (1888), 42, 71, 125, 127.
General Rly. Syndicate, *in re* ; Whiteley's *case* (1899), 449.
Gerard, etc., *in re* (1895), 292.
Gerran *v.* Alexander (1781), 396.
Gibson *v.* Adams (1875), 451.
  v. Arbuthnot (1726), 404.
  v. Barton (1875), 47, 106, 116.
  v. Caledonian Rly. Co. (1896), 357.
  v. Scot (1739), 178.
  v. Stevenson (1822), 355, 356.
Gibson's trs. *v.* Ross (1877), 396, 397.
Gifford's trs. *v.* Gifford (1904), 396.
Gilbert *v.* Star Newspaper Co. (1894), 468.
Gilbert's *case* (1870), 69, 80, 96, 103.
Giles *v.* London, Chatham and Dover Rly. Co. (1861), 305.
Gilfillan *v.* Ure (1824), 432.
Gill *v.* Arizona Copper Co. (1900), 44, 88, 89, 127, 139.
Gillespie *v.* City of Glasgow Bank (1879), 85.
Gillespie & Paterson *v.* City of Glasgow Bank (1879), 62.
Gillespie *v.* Lucas & Aird (1893), 287.
  v. Mercer (1876), 340.
  v. Paisley Road Trust (1900), 274.
Gillespie & Co. *v.* Howden & Co. (1885), 451.
Gillies *v.* Dawson (1893), 148.
Gilliland *v.* Ayr County Council (1907), 278, 280.
Gilmour *v.* Gilmours (1873), 213.
Gilmour's trs. *v.* Kilmarnock Heritable Property Investment Co. (1883), 106.
Girdwood *v.* Midlothian Standing Joint Cte. (1894), 579.
Gladstone *v.* M'Callum (1896), 106.
Glamorgan County Council *v.* Cardiff City Council and Swansea Borough Council (1915), 561.
Glasgow, Earl of, *v.* Boyle (1887), 410.
Glasgow and South-Western Rly. Co. *v.* Bain (1893), 293.
Glasgow, Airdrie, and Monklands, etc. Rly. Co. *v.* Glasgow Waterworks Co. (1849), 269, 271.
Glasgow, Barrhead and Neilston Rly. Co. *v.* Nitshill Coal Co. (1848), 274, 294.
Glasgow, City and District Rly. Co. *v.* MacBrayne (1883), 270.
  v. Hutchison's trs. (1884), 311.
  v. Macgeorge, Cowan & Galloway (1886), 278.
  v. Meldrum's trs. (1884), 311.
  v. MacBrayne (1883), 310.
Glasgow Coal Exchange Co. *v.* Glasgow and District Rly. Co. (1883), 271, 289.
Glasgow District Subway Co. *v.* Albin & Son (1895), 273, 280.
  v. Esslemont (1895), 273.
  v. Johnstone (1892), 280, 306.
  v. Robertson's trs. (1895), 264, 286.
Glasgow Mags. *v.* Farie (1888), 290, 292.
  v. Glasgow and South-Western Rly. Co. (1895), 289.
  v. Miller (1905), 278.
  v. Watson (1898), 544.
Glasgow Pavilion, Ltd. *v.* Motherwell (1903), 75.
Glasgow, etc. Steam Shipping Co. *v.* Watson (1873), 450.
Glasgow Subway Co. *v.* Provan (1893), 312.
Glasgow Tailors (1887), 538.
  v. Blackie (1851), 178, 181.
Glasgow Tramways and Omnibus Co. *v.* Glasgow Mags. (1891), 128, 129, 130, 131.
Glasgow University *v.* Glasgow Faculty of Physicians and Surgeons (1834–40), 5, 542, 543, 546.
  v. Kirkwood (1872), 545.
Glasgow, Yoker, etc. Rly. Co. *v.* Lidgerwood (1895), 312.
  v. Moore (1894), 270.
Glasier *v.* Rolls (1889), 14.
Glass *v.* M'Intosh (1825), 250.
Glencairn *v.* Brisbane (1677), 451.
Glendinning's crs. *v.* Montgomery (1745), 166.
Glenville *v.* Selig Polyscope Co. (1911), 481.
Glenyards Fireclay Co. (1907), 66.
Globe New Patent Iron Co., *in re* (1879), 150.
Glossop *v.* Glossop (1907), 103.
Glover's trs. *v.* City of Glasgow Union Rly. Co. (1869), 309.
Gluckstein *v.* Barnes (1900), 14.

Glyn *v.* Weston Feature Film Co. (1916), 475.
Godden *v.* Hales (1686), 423.
Goetze *v.* Aders (1874), 363.
Goldie *v.* Torrance (1882), 59, 72.
Goldsmith's Co. *v.* West Metropolitan Rly. Co. (1904), 268.
Gollan's trs. *v.* Booth (1901), 223.
Gonty, etc. Rly. Co., *in re* (1896), 268, 288.
Goodall *v.* Little (1851), 349.
Goodwin *v.* Robarts (1875), 145, 146.
Gordon *v.* British and Foreign Metaline Co. (1886), 127.
    v. City of Glasgow Bank (1879), 62, 84.
    v. Davidson (1865), 166.
    v. Mackintosh (1841), 397.
    v. Mather (1757), 388.
    v. Milne (1780), 171.
    v. Sutherland (1731), 390.
Gordon, Duke of, *v.* The Crown (1750), 390.
Gordon's exrs. *v.* Gordon (1918), 445.
Gorrissen's *case* (1873), 59, 60.
Gough *v.* Aspatria, etc. Water Board, *in re* (1904), 287.
Gould *v.* Staffordshire Potteries Waterworks Co. (1850), 275.
Gourlay *v.* Mackie (1887), 86.
Govan (1886), 367, 370.
Gover's *case* (1875), 53, 56.
Governments Stock Investment Co., *in re* (1891), 128, 129.
Gow *v.* Henry (1899), 256.
Gowans *v.* Dundee Steam Navigation Co. (1904), 55, 65.
Gowan's trs. *v.* Carstairs (1862), 451.
Graham *v.* Caledonian Rly. Co. (1848), 299, 302, 303.
    v. Cuthbertson (1828), 249, 251.
    v. Park (1639), 394.
Graham's trs. *v.* Grahams (1868), 342.
Graham & Co. *v.* United Turkey Red Co. (1922), 457.
Gramophone and Typewriter Co. *v.* Stanley (1908), 96.
Grant *v.* Brooke (1882), 337, 341.
    v. Edinburgh, Perth and Dundee Rly. Co. (1851), 297, 300, 301.
    v. Grant (1748), 351; (1757), 401.
    v. United Kingdom Switchback Rlys. Co. (1888), 95, 97, 112, 134.
Grant's trs. *v.* Grant (1862), 331, 336, 341.
Graves, *in re* (1869), 483.
Gray *v.* North-Eastern Rly. Co. (1876), 275.
    v. Petrie (1849), 438.
    v. Smith (1836), 541, 545.
    v. Wyllie (1904), 358.
Grays *v.* Wood and ors. (1773), 394.
Great Northern Rly. Co. *v.* Clark (1856), 86.
Great Northern Salt and Chemical Works, *in re* (1890), 60, 91, 102, 114.
Great North of Scotland Rly. Co. *v.* Anderson (1897), 138.
Great North-West Central Rly. Co. *v.* Charlebois (1897), 136.
Great Western Rly. Co. *v.* Bennett (1867), 292.
    v. May (1874), 309, 310.
    v. Midland Rly. Co. (1908), 268.
    v. Swindon, etc. Rly. Co. (1884), 267, 289.
Greater Britain Products Development Corpn., *in re* (1924), 65.
Greenberg *v.* Cooperstein (1926), 12.
Greenock *v.* Greenock (1736), 401, 412.
Greenough *v.* Gaskell (1833), 347, 348, 349.
Greenwood *v.* Leather Shod Wheel Co. (1900), 49.
Greig *v.* Christie (1837), 384.
    v. Edmonstone (1826), 356.
    v. Malcolm (1835), 337, 341.
Greig's trs. *v.* Simpson (1918), 339.
Greive *v.* Kilmarnock Motor Co. (1923), 9.
    v. Williamson (1760), 178.
Gresham Life Assce. Soc., *in re* (1872), 82, 83, 96.
Gresham (Sir Thomas), Duty on the Estate of, *in re* (1897), 538.
Grianaig Shipping Co., Ltd. (1899), 46.
Grierson *v.* Cheshire Lines Com. (1874), 270, 272.
Grierson, Oldham & Co. *v.* Forbes, Maxwell & Co. (1895), 135.
Griffith *v.* Paget (1877), 26.
Griffith's trs. *v.* Griffith (1912), 372.
Grimwade *v.* Mutual Society (1884), 98.
Grosvenor and West End Rly. Terminus Hotel (1897), 119.
Grove *v.* Dubois (1786), 165.
Grundy *v.* Briggs (1910), 62, 72, 93.
Guild *v.* Young (1884), 86.
Guinness *v.* Land Corpn. of Ireland (1882), 89, 130.
Gunn *v.* Dollar Parochial Board (1886), 301.
    v. Muirhead (1899), 60, 73.
Gunnis' trs. *v.* Gunnis (1903), 124.
Gyles *v.* Wilcox (1740), 472, 501.

HACKNEY PAVILION, LTD., *in re* (1924), 83.
Haddington Masons and Wrights (1881), 547.
Haggin *v.* Comptoir d'Escompte de Paris (1889), 8.
Halcrow *v.* Shearer (1892), 358.
Haldane *v.* Duke of Douglas (1753), 152.
    v. Haldane (1766), 203.
    v. Speirs (1872), 444.
Halifax Sugar Refining Co. *v.* Francklyn, Ltd. (1889), 102.
Hall *v.* Barrows (1863), 475.
    v. City of Glasgow Union Rly. Co. (1881), 311.
    v. Hall (1891), 331, 337, 339.
Hall-Maxwell *v.* Gill (1901), 450.
Halliday (1869), 335, 336, 338, 341.
Hamilton, Duke of (1858), 297, 301.
Hamilton *v.* Allan (1861), 438.
    v. Anderson (1856), 434, 435.

Hamilton *v.* Anderson (1858), 429.
  v. Baird & Lewis (1893), 256.
  v. Caledonian Rly. Co. (1847–50), 434, 435, 438.
  v. Hamilton (1838), 340.
  v. Hamilton's trs. (1902), 340.
  v. Hardie (1888), 361.
  v. Lochrane (1899), 443.
  v. M'Queen's trs. (1845), 166.
  v. Smith (1858), 15.
Hamilton, Duke of, *v.* Earl of Selkirk (1740), 401.
  v. Hamilton (1819), 350.
Hamilton of Dalzell, Lord, *v.* Caledonian Rly. Co. (1914), 301.
Hamilton's trs. *v.* Caledonian Rly. Co. (1905), 293.
Hamley's *case* (1877), 58.
Hammersmith Rly. Co. *v.* Brand (1870), 285, 286, 287.
Hammond *v.* Prentice Bros. (1920), 16.
Hampson *v.* Price's Patent Candle Co. (1876), 95.
Hanfstaengl *v.* Baines & Co. (1895), 483, 504.
  v. Empire Palace (1894), 504.
Hannan's Empress, etc. Co. (1896), 59.
Hannay *v.* Muir (1898), 96, 139.
Hannay & Sons' trs. *v.* Armstrong Bros. & Co. (1875), 153, 162, 163.
Harben *v.* Phillips (1883), 25, 96, 102, 103, 108, 111.
Hardoon *v.* Belilios (1901), 80.
Hare's *case* (1869), 54.
Hargreaves (Joseph), Ltd., *re* (1900), 358, 359.
Harker *v.* Pottage (1909), 452.
Harms (Incorporated) *v.* Martan's Club, Ltd. (1926), 502.
Harper *v.* Robinson (1821), 355.
Harpers, Ltd. *v.* Barry, Henry & Co., Ltd. (1892), 473, 498.
Harris *v.* Gillespie, Cathcart & Fraser (1875), 8.
Harris & Co. *v.* Warren and Phillips (1918), 474.
Harrison, *ex parte* (1885), 81; (1894), 32.
Harrison *v.* Mexican Rly. Co. (1875), 127.
Hart *v.* Hart (1630), 389.
Hartley's *case* (1875), 74.
Harvey *v.* Distillers Co., Ltd. (1885), 65.
  v. Donald (1815), 396.
  v. Smith (1904), 448, 450.
Harvey, Brand & Co. *v.* Buchanan, Hamilton & Co.'s tr. (1866), 162.
Harvey's Oyster Co. (1894), 32.
Harvey's Yoker Distillery, Ltd. *v.* Sinclair (1901), 72.
Harvie *v.* Ross (W. & T.) (1886), 437.
Harvie *v.* South Devon Rly. Co. (1874), 270.
Hastings *v.* Chalmers (1890), 357.
Hastings, Marchioness of, *v.* Marquis of Hastings' exrs. (1852), 363.
Hay *v.* Aberdeen Corpn. (1909), 220.
Hay *v.* Crawford (1712), 163.
  v. Hay (1758), 199.
  v. North British Rly. Co. (1873), 300.
  v. Rafferty (1899), 251, 253.
Hay's *case* (1875), 100, 450.
Hay, Thomson & Blair *v.* Edinburgh and Glasgow Bank (1858), 348.
Haycroft Gold Reduction, etc. Co., *in re* (1900), 108.
Hazlitt *v.* Templeman (1866), 493.
Head *v.* Tattersall (1871), 449.
Healy and Young *v.* Main's trs. (1914), 386, 387.
Hearts of Oak Life and General Assce. Co., *in re* (1920), 132.
Hebb's *case* (1867), 60.
Hedderwick *v.* Griffin (1841), 472.
Hedges *v.* Metropolitan Rly. Co. (1860), 272.
Heggie *v.* Heggie (1858), 164.
Heiton *v.* Waverley Hydropathic Co. (1877), 26, 89, 95, 136.
Hemp, Yarn and Cordage Co. (1896), 32.
Henderson *v.* Bank of Australasia (1889), 95; (1890), 109, 110.
  v. Campbell (1921), 246.
  v. Hedrich (1892), 347, 354.
  v. Henderson (1890), 342.
  v. Lacon (1867), 48.
  v. Laing (1824), 431.
  v. Louttit & Co. (1894), 110.
  v. M'Gown (1916), 358, 359.
  v. Maclellan (1874), 436, 437.
  v. Robertson (1853), 357.
  v. S.S.C. Society Widows' Scheme Contributors (1842), 124.
  v. Stubbs Ltd. (1894), 135, 454.
Henderson (D. & W.) & Co. *v.* Stewart (1894), 256.
Henderson & Co., Ltd. *v.* Turnbull & Co. (1909), 154.
Hendricks *v.* Montagu (1882), 27.
Hendry *v.* Hendry (1916), 257.
Henry *v.* Great Northern Rly. Co. (1857), 123.
  v. Morrison (1881), 456.
  v. Strachan & Spence (1897), 249, 250.
Henthorn *v.* Fraser (1892), 60, 450.
Hepburn *v.* Bell (1816), 156.
Hercynia Copper Co., *in re* (1894), 93.
Heriot's Trust *v.* Caledonian Rly. Co. (1914), 243, 244; (1915), 271, 282, 283, 302.
Heritable Securities Investment Assoc. *v.* Miller's trs. (1893), 85.
Hermann (1902), 365.
Heron *v.* Duke of Queensberry (1733), 413, 414.
  v. Espie (1856), 269.
Hickman *v.* Kent or Romney Marsh Sheepbreeders' Assoc. (1915), 25, 26.
Higgins and Hitchman, *in re* (1882), 309.
Hill *v.* Caledonian Rly. Co. (1887), 282.
  v. City of Glasgow Bank (1879), 18, 83.

Hill *v.* Grant (1899), 566.
Hilder *v.* Dexter (1902), 31.
Hindle *v.* John Cotton Ltd. (1919), 82.
Hindley's *case* (1896), 59.
Hinds (1859), 364.
Hinton *v.* Donaldson (1773), 467.
Hinton, etc. *v.* Connell's trs. (1883), 380.
Hippisley's *case* (1873), 89.
Hirji Mulji *v.* Cheong Yue Steamship Co. (1926), 457, 458.
Hirsche *v.* Sims (1894), 99.
Hislop *v.* MacRitchie's trs. (1881), 454, 455.
Hoadly *v.* M'Laine (1834), 449.
Hoare & Co., Ltd., *in re* (1904), 121.
Hobbs *v.* Midland Rly. Co. (1882), 310.
Hogg *v.* Brack (1832), 388, 390.
  v. Kirby (1803), 475, 477.
  v. Scott (1874), 499.
Hoggan *v.* Tharsis Sulphur and Copper Co. (1882), 43, 123.
Holditch *v.* Canadian Northern Ontario Rly. Co. (1916), 279, 287.
Hole *v.* Bradbury (1879), 495.
Holliday *v.* Scott (1830), 460.
  v. Wakefield Mayor (1891), 291, 292, 294.
Hollinrake *v.* Truswell (1894), 474.
Hollinworth *v.* Dunbar (1813), 249.
Holmes *v.* Newcastle-upon-Tyne Freehold Abattoir Co. (1875), 119.
Home *v.* Bentinck (1820), 356.
Home and Foreign Investment and Agency Co., *in re* (1912), 35, 125.
Homer District Consolidated Gold Mines (1888), 102.
Hong-Kong Gas Co. *v.* Glen (1914), 74.
Hong-Kong and Whampoa Dock Co. *v.* Netherton Shipping Co. (1909), 460.
Hoole *v.* Great Western Rly. Co. (1867), 123.
  v. Speak (1904), 57.
Hooper *v.* Bourne (1880), 309, 310.
  v. Kerr, Stuart & Co. (1900), 105, 134.
Hope (1845), 349, 353.
Hope *v.* International Finance Soc. (1876), 86, 88.
Hope's trs. *v.* Scottish Accident Insce. Co. (1895), 346, 354.
Hopetoun *v.* North British Rly. Co. (1893), 290.
Hopkinson *v.* Mortimer, Harley & Co. (1917), 71, 86.
Horbury Bridge Coal, etc. Co., *in re* (1879), 110.
Horsefall *v.* Virtue & Co. (1826), 250.
Horton *v.* Colwyn Bay, etc. Urban District Cte. (1908), 279.
Hotten *v.* Arthur (1863), 473.
Ho Tung *v.* Man On Insurance Co. (1902), 90.
Houlditch *v.* Spalding (1847), 224.
Houldsworth *v.* City of Glasgow Bank (1879–80), 54, 55.
Household Fire Insce. Co. *v.* Grant (1879), 60, 450.
Houston *v.* Mitchell (1877), 396.
Howard *v.* Patent Ivory Manufacturing Co. (1888), 26, 143.
Howard de Walden, Baroness (1900), 205.
Howard's trs. *v.* Howard (1907), 124.
Howden *v.* Goldsmiths Incorpn. (1840), 545, 546.
Howe *v.* City of Glasgow Bank (1879), 66, 84, 85.
Howley Park, etc. Co. *v.* London and North-Western Rly. Co. (1913), 292.
Howling's trs. *v.* Smith (1905), 110.
Hoylake Rly. Co., *in re* (1874), 80.
Hughes *v.* Edwards (1892), 331, 336, 341.
  v. Vargas (1893), 359.
Humboldt Redwood Co. liqr. *v.* Coats (1908), 25, 29.
Humphrey & Denman *v.* Kavanagh (1925), 59.
Hunter *v.* City of Glasgow Bank (1879), 66.
  v. North British Rly. Co. (1849), 279, 307.
  v. Wilson (1848), 436.
Hunter's trs. *v.* Macan (1839), 403.
Huntington Copper Co. *v.* Henderson (1877), 13, 100.
Huntly, Marquis of, *v.* Aboyne and Braemar Rly. Co. (1868), 301.
Hussey *v.* Horne-Payne (1879), 452, 453.
Hutchinson *v.* Manchester, etc. Rly. Co. (1846), 306.
Hutchison *v.* Anderson's trs. (1853), 397.
  v. Edinburgh and Glasgow Rly. Co. (1848), 265.
  v. Hutchison (1872), 204, 222.
Hutchison's *case* (1895), 93.
Huth *v.* Clarke (1890), 106.
Hutton *v.* London and South-Western Rly. Co. (1849), 303.
  v. West York Rly. Co. (1883), 93, 95.
Hutton's trs. *v.* Hutton (1847), 396, 397.
Hyam's *case* (1859), 80.
Hyslop *v.* Staig (1816), 348.

IMPERIAL HYDRO. HOTEL CO., BLACKPOOL *v.* Hampson (1882), 89, 95, 103.
Imperial Mercantile Credit Assoc. liqr. *v.* Coleman (1874), 100.
Irvine and Fullarton Property Investment Soc. *v.* Cuthbertson (1905), 86.
Inchiquin, Lord, *ex parte* (1891), 93.
Income Tax Commrs. *v.* Pemsel (1891), 23, 538.
Incorporated Glasgow Dental Hospital *v.* Lord Advocate (1927), 19, 71, 128.
Indian Zoedone Co., *in re* (1884), 110.
Indo-China Steam Navigation Co., *in re* (1917), 65, 82.
Inge *v.* Birmingham, etc. Rly. Co. (1853), 304.
Inglis *v.* Buttery & Co. (1878), 452.

Inglis *v.* Caledonian Rly. Co. (1899), 300.
  v. Douglas (1861), 97.
  v. Gardner (1843), 351.
Inland Revenue *v.* Blott (1921), 38.
  v. Forrest (1890), 23.
  v. Glasgow and South-Western Rly. Co. (1887), 303.
  v. Scott (1892), 538.
Innes (1831), 429.
Innes *v.* Gordon (1844), 179.
  v. Innes (1670), 335.
  v. Stewart (1542), 390.
International Correspondence Schools, Ltd. *v.* Irving (1915), 457.
International Fibre Syndicate *v.* Dawson (1900), 456.
Inverarity *v.* Forfarshire County Council (1906), 566.
Inverness Mags. *v.* Groat (1898), 320.
  v. Highland Rly. Co. (1893), 243, 302; (1909), 283, 302.
Ireland & Son *v.* Rosewell Gas Coal Co. (1900), 453.
Ironside *v.* Wilson (1871), 250, 252.
Irvine *v.* Glasgow and South-Western Rly. Co. (1913), 346.
  v. Menzies (1711), 152.
  v. Union Bank of Australia (1877), 125, 142, 143.
Isaac's *case* (1892), 93.
Isle of Wight Rly. Co. *v.* Tahourdin (1884), 108.

Jack *v.* Marshall (1879), 398.
  v. Roberts & Gibson (1865), 450.
Jackson *v.* Rainford Coal Co. (1896), 143.
  v. Star Fire and Burglary Insce. Co. liqr. (1902), 66.
  v. Union Marine Insce. Co. (1874), 460.
Jackson & Co., *in re* (1899), 74.
Jackson's trs. *v.* Black (1832), 415.
Jacobs *v.* Credit Lyonnais (1884), 460.
Jacobsen, Sons & Co. *v.* Underwood & Son, Ltd. (1894), 450.
Jaeger Bros., Ltd. *v.* M'Morland (J. & A.) (1902), 453.
Jaffray *v.* Simpson (1835), 350.
Jaffray's tr. *v.* Milne (1897), 157.
Jamaica Rly. Co. *v.* Att.-Gen. of Jamaica (1893), 121, 122.
Jamal *v.* Moolla Dawood & Co. (1916), 81.
James *v.* Buena Ventura Nitrate Grounds Syndicate, Ltd. (1896), 85, 123.
  v. Eve (1873), 92.
Jamieson (1902), 365.
Jamieson *v.* North British Rly. Co. (1868), 290.
  v. Waterhouse (1868), 77.
Jarrold *v.* Haywood (1870), 500.
  v. Houlston (1857), 500.
Jarvis *v.* Anderson (1841), 347, 348.
Jazdowski (1889), 384.
Jenkins' Claim (1906), 135.
Jennings *v.* Broughton (1853), 53.
Jessopp's *case* (1857), 80.
Jewish Colonial Trust, *in re* (1908), 130.
Jobson (1900), 367.
Johannesburg Hotel Co., *in re* (1891), 91.
Johnson *v.* Lyttle's Iron Agency (1877), 86, 105.
Johnston (1899), 398.
  v. Caledonian Rly. Co. (1892), 358.
  v. Clark (1855), 450.
  v. Cruikshanks (1685), 403.
  v. Grant (1923), 435.
  v. Ireland (1610), 389.
  v. Johnston (1859), 256.
  v. Losh (1844), 165.
  v. Robertson (1861), 457.
  v. Scott & Son (1818), 165.
  v. Walker trs. (1897), 454.
Johnston's exr. *v.* Dobie (1907), 366.
Johnstone *v.* Carson (1823), 249, 251.
  v. Pettigrew (1865), 194.
Johnstone's exrs. *v.* Johnstone (1902), 339, 340.
Joint Stock Discount Co. *v.* Brown (1866), 126; (1869), 98, 99, 106.
Jones (1904), 81.
  v. Daniel (1894), 452.
  v. Moore (1841), 511.
  v. North Vancouver Land, etc. Co. (1910), 86.
  v. Oceanic Steam Navigation Co. (1924), 460.
  v. Pacaya Rubber Co. (1911), 69, 86.
  v. St. John's College (1870), 454.
Jones, *ex parte: in re* London and Northern Bank (1900), 450.
Joseph *v.* Sonora (Mexico) Land Co. (1918), 94.
Jubilee Cotton Mills, Ltd., liqr. *v.* Lewis (1923–4), 14, 18, 25, 58, 61, 100.
Jude's Musical Compositions, *in re* (1907), 493, 495.

Karberg's *case* (1892), 32.
Karno *v.* Pathé Frères, Ltd. (1909), 481, 496.
Keith *v.* Fraser (1883), 365.
  v. Purves (1684), 351.
Keith, Prowse & Co. (1918), 66.
Keith's trs. *v.* Keith (1908), 340, 341.
Kelantan Estates, *in re* (1920), 110.
Kelly *v.* Byles (1878), 475.
  v. Hooper (1840), 473.
  v. Morris (1866), 473, 499, 506.
Kelly's Directories *v.* Gavin and Lloyds (1902), 473, 496, 499.
Kelner *v.* Baxter, (1866), 134.
Kelvinside Estate Co. *v.* Donaldson's trs. (1879), 269.
Kemp *v.* Baerselman (1906), 456.
Kemsley *v.* Buffel's Land and Mining Co. (1897), 94.
Kennedy *v.* Arbuthnot (1722), 221.

Kennedy *v.* North British Wireless Schools, Ltd. (1915), 83.
Kenneth & Sons *v.* Ayrshire County Council (1900), 564, 565.
Kenrick *v.* Lawrence (1890), 483, 486, 498.
Kent Coalfields Syndicate, Ltd., *in re* (1898), 64, 115.
Kent *v.* Freehold Land Co. (1868), 449.
"Kentmere," Sailing Ship (1897), 104.
Ker *v.* City of Glasgow Bank (1879), 85.
  v. Howison (1708), 222.
Ker's trs. *v.* Justice (1868), 171.
Kerr (1822), 429.
  v. Duke of Roxburgh (1822), 348.
  v. Outram (1913), 358.
  v. Turnbull (1728), 389.
Kerr's trs. *v.* Yeaman's trs. (1888), 189, 234, 237.
Kesson *v.* Aberdeen Wrights' and Coopers' Incorpn. (1898), 124.
Key (1880), 366.
Key & Son, *in re* (1902), 62.
Kharaskhoma Exploring, etc. Syndicate, *in re* (1897), 74.
Kibble *v.* Ross (1804), 198.
Kid *v.* Bunyan (1842), 350.
Kidd *v.* Paton's trs. (1912), 148.
Kilmarnock Mags. *v.* Mather (1867), 139.
Kilpatrick *v.* Miller (1825), 250.
Kinatan (Borneo) Rubber Co., Ltd., *re* (1923), 70.
King (1871), 82.
King Line, Ltd. (1902), 28, 128, 129, 130.
King *v.* Davidson (1821), 429.
Kinghorn *v.* Glenyards Fireclay Co. (1907), 55.
Kingsburgh Motor Construction Co. *v.* Scott (1902), 93, 103.
Kingston Cotton Mill Co., Ltd., *in re* (1896), 99, 101, 117, 118.
Kinloch (1795), 347.
  v. Irvine (1884), 347, 354.
Kinsey, *in re* (1863), 298.
Kintore, Earl of, *v.* Countess Dowager of Kintore (1884), 398.
Kippen *v.* Kippen's tr. (1874), 256.
Kirk & Grieve *v.* Bennet (1812), 166.
Kirk's trs. (1904), 298.
Kirkcaldy Café Co. (1921), 128, 132.
Kirkcaldy District Cte. *v.* Buckhaven Commrs. (1895), 566.
  v. Buckhaven Gas Commrs. (1925), 289.
Kirkcaldy Steam Laundry Co. (1904), 28, 128.
Kirkpatrick *v.* Allanshaw Coal Co. (1880), 452.
Klenck *v.* East India Co., etc. Ltd. (1888), 30, 42, 73, 77, 128.
Knapp *v.* London, Chatham and Dover Rly. Co. (1863), 304.
Knight's *case* (1867), 114.
Knox *v.* Knox's trs. (1905), 393.
Knox's trs. *v.* Knox (1907), 331, 332, 333, 334.
Koffyfontein Mines *v.* Moseley (1911), 33.
Konratti's *case* (1893), 93.
Kreditbank Cassel *v.* Schenkers, Ltd. (1927), 26.
Kyle *v.* Jeffreys (1856), 493.

Lackworthy's *case* (1903), 87.
La Compagnie de Mayville *v.* Whitley (1896), 91, 102, 139; (1896), 139.
Lacy *v.* Toole (1867), 493.
Ladd's *case* (1893), 87.
Ladies' Dress Assoc. Ltd. *v.* Pulbrook (1900), 47, 70, 87.
Lafone *v.* Falkland Islands Co. (1857), 349.
Lagunas Nitrate Co. *v.* Lagunas Nitrate Syndicate (1899), 14.
  v. Schroeder & Co. (1901), 122.
Laidlaw *v.* Provident Plate Glass Insce. Co., Ltd. (1890), 8.
Laidlay's trs. *v.* Lord Advocate (1890), 8.
Laing *v.* Caledonian Rly. Co. (1846), 269; (1850), 274.
La Lanière de Roubaix *v.* Glen Glove Co. (1926), 111.
Lamb *v.* Evans (1892), 473, 477; (1893), 468, 474.
  v. North London Rly. Co. (1869), 268.
  v. Sambar Rubber Co. (1908), 69, 86.
Lanark County Council *v.* Motherwell Mags. (1912), 561.
Lanark, Masons of, *v.* Hamilton (1730), 3.
Lanarkshire County Auditor *v.* Lambie (1905), 578.
Lanarkshire County Council *v.* Lord Advocate (1892), 570, 579.
  v. Hart (1904), 574.
Lanarkshire Middle Ward Dist. Cte. *v.* Marshall (1896), 280.
Lanarkshire and Dumbartonshire Rly. Co. *v.* Main (1895), 280.
Landa *v.* Greenberg (1908), 475.
Landales *v.* Landale (1752), 178, 209.
Land Credit Co. of Ireland, *in re* (1869), 102.
  v. Lord Fermoy (1870), 97, 99.
Landeker and Brown *v.* Wolff (1907), 493.
Lang *v.* Glasgow Court House Commrs. (1871), 276, 277.
Larocque *v.* Beauchemin (1897), 69, 73.
Lascelles *v.* Swansea School Board (1899), 275.
Latour *v.* Bland (1818), 492.
Lauderdale, Earl of, *v.* Boyle's exrs. (1830), 337.
Lauri *v.* Read (1892), 512.
Lavaggi *v.* Pirie & Son (1872), 165.
Lavers *v.* London County Council (1905), 270.
Law *v.* Caledonian Rly. Co. (1851), 286.
Law Reporting, Incorporated Council of, *in re* (1888), 538, 539.

Lawrence (1867), 19, 54, 64.
Lawrence & Bullen, Ltd. *v.* Aflalo and Cook (1904) 487.
Lawrence *v.* Campbell (1859), 347.
v. Great Northern Rly. Co. (1851), 287.
v. Smith (1822), 475.
v. West Somerset Mineral Rly. Co. (1918), 120.
v. Wynn (1839), 68.
Lawrie *v.* Donald & Jones (1830), 388.
v. Lawrie's trs. (1892), 260.
v. Roberts (1882), 429.
Laws *v.* Tod (1697), 393.
Lawson *v.* Burman (1831), 154.
v. Caledonian Rly. Co. (1881), 286.
v. Drysdale (1844), 154.
Leader *v.* Purday (1849), 481, 493, 502.
Lee (1859), 366.
Lee *v.* Alexander (1883), 452.
v. Birrell (1813), 358.
v. Crawford (1890), 96, 125, 139.
v. Haley (1869), 27.
v. Neuchatel Asphalt Co. (1889), 100, 120, 121.
Leeds Estate Building, etc., Co. *v.* Shepherd (1887), 94, 98, 100, 115, 117, 118.
Leeds and Hanley Theatre of Varieties, Ltd., *in re* (1902), 15, 100.
Lees *v.* Tod (1882), 55, 115, 116.
Lees Brook Spinning Co. (1906), 41.
Leggat Bros. *v.* Gray (1908), 75.
Leith *v.* Leith (1863), 335.
Leith Harbour Commrs. *v.* Trinity Harbour Co. (1842), 277.
Leith Wrights, etc. (1856), 547.
Lemon *v.* Austin Friars Investment Trust (1926), 145.
Lena *v.* Davidson (1913), 583.
Lennie *v.* Pillans (1843), 473.
Leslie (1861), 367.
v. Grant (1760), 348.
v. M'Indoe's trs. (1824), 246.
v. Orkney Commrs. (1883), 556.
v. Young & Sons (1893), 473, 499.
Leslie's Judicial Factor (1925), 233.
Lethbridge *v.* Adams (1872), 67.
Letheby & Christopher Ltd., *re* (1904), 81.
Lethem *v.* Evans (1918), 365.
Leven *v.* Young (1818), 357.
Leven Burgh *v.* Fife County Council (1925), 567.
Levick's *case* (1870), 58.
Levy *v.* Rutley (1871), 493.
Lewis (1872), 94.
Lewis *v.* Fullerton (1839), 473.
Lewis Island Preserved Specialties Co. (1923), 47.
Leys *v.* Leys (1886), 433, 434.
Libraco, Ltd. *v.* Shaw Walker (1913), 474.
Licensed Victuallers Newspaper Co. *v.* Bingham (1888), 475.
Liddle *v.* Young (1852), 165.
Life Association of Scotland *v.* Caledonian Heritable Sec. Co. (1886), 126, 127, 136.
Lindlar's *case* (1910), 80, 82.
Lindsay *v.* City of Glasgow Bank (1879), 85.
v. Giles (1844), 244.
Lindsay's Children, etc. *v.* Dott (1807), 395.
Lindsay's Curator *v.* City of Glasgow Bank (1879), 62.
Linen and Woollen Drapers', etc. Institution (1887), 538.
Linlithgow, Marquis of, *v.* North British Rly. Co. (1914), 291.
Lion Insurance Assoc. *v.* Tucker (1883), 68.
Little *v.* Smith (1845), 359.
v. Spreadbury (1910), 257.
Liverpool Household Stores Assoc. Ltd., *in re* (1890), 99.
Liverpool Marine Credit Co. *v.* Hunter (1868), 144.
Livingston *v.* Reid (1833), 161.
Livingstone *v.* Dinwoodie (1860), 345.
v. Napier (1765), 203.
v. Waddell's trs. (1899), 223.
Lloyd *v.* Grace, Smith & Co. (1911), 104, 133.
Lochgelly Iron and Coal Co. *v.* Sinclair (1907), 166.
Lock *v.* Queensland Investment, etc. Co. (1896), 19, 70, 88.
Lockerby *v.* City of Glasgow Improvement trs. (1872), 269, 278, 442.
Lockhart *v.* Ferrier (1842), 165; (1837), 181.
Lockhart's trs. *v.* Lockhart (1921), 395, 396, 397.
Logan (1889), 301.
Logan *v.* Bank of Scotland (1906), 8.
v. Miller (1920), 345.
London Assce. Co. *v.* London and Westminster Assce. Corpn. (1863), 27.
London Celluloid Co., *in re* (1888), 78.
London and County Banking Co. *v.* London and River Plate Bank (1887), 79.
London County Council *v.* Att.-General (1902), 67.
London and Edinburgh Shipping Co. (1909), 126, 128, 129.
London Financial Assoc. *v.* Kelk (1884), 98.
London Founders' Assoc. *v.* Clarke (1888), 80, 81.
London and General Bank (No. 2), *in re* (1895), 100, 117, 118.
London Gigantic Wheel Co. (1908), 94.
London and Globe Financial Corporation (1903), 101.
London Joint Stock Bank *v.* Simmons (1892), 79.
v. Stewart & Co. (1859), 163.
London and New York Investment Corpn. (1895), 42, 44, 125.
London and Northern Bank, *in re: ex parte* Jones (1900), 450.

London and Northern S.S. Co. *v.* Farmer (1914), 70.
London and North-Western Rly. Co. *v.* Evans (1893), 290.
London Printing and Publishing Alliance, Ltd. *v.* Cox (1891), 493, 494.
London and Scottish Bank (1866), 9.
London and Southern Counties Freehold Land Co., *in re* (1885), 91.
London and South-Western Canal Co., Ltd., *in re* (1911), 92, 99.
London and South-Western Rly. Co. *v.* Blackmore (1874), 309, 310.
  v. Gomm (1882), 309.
London University Press *v.* University Tutorial Press (1916), 470, 472.
Longman *v.* Bath Electric Tramways (1905), 78.
Loosemore *v.* Tiverton, etc. Rly. Co. (1882), 304, 305, 306.
Loudon *v.* Ayr Tailors (1891), 544.
Lovat, Lord, *v.* Macdonell (1868), 437.
Love *v.* Amalgamated Soc. of Lithographic Printers, etc. (1912), 455.
  v. Marshall (1872), 256.
  v. Storie (1863), 387, 390.
Lover *v.* Davidson (1856), 481, 502.
Low's exrs. *v.* City of Glasgow Bank (1879), 85.
Low's trs. *v.* Whitworth (1892), 338.
Lowe's *case* (1869), 83.
Loyd *v.* Freshfield (1826), 352.
Lubbock *v.* British Bank of South America (1892), 119, 120, 121.
Lucas and Chesterfield Gas and Water Board, *in re* (1909), 287.
Lumsdaine *v.* Balfour (1828), 348.
Lumsden *v.* Peddie (1866), 62, 85.
Lurgan's (Lord) *case* (1902), 52, 66.
Lynch *v.* Glasgow Corpn. (1903), 280.
Lynde *v.* Anglo-Italian Hemp Spinning Co. (1896), 52.
Lyons *v.* Knowles (1863), 503.
Lyster's *case* (1867), 102.

M'Adam *v.* M'Adam (1879), 205, 213.
Macalister *v.* Macalister (1865), 388.
M'Allister *v.* M'Gallagley (1911), 452.
M'Alpine (1882), 336.
M'Alpine (Robert) & Sons *v.* Ronaldson (1903), 138.
MacArthur *v.* Argyllshire County Council (1898), 576.
Macarthur *v.* Lawson (1877), 448.
M'Arthur, Ltd., liqr. *v.* Gulf Line, Ltd. (1909), 71, 90.
Macartney *v.* Garbutt (1890), 447.
Macbride *v.* Caledonian Rly. Co. (1894), 345.
M'Bride *v.* Lewis (1922), 346.
Macbride *v.* Stevenson (1884), 251.
M'Call *v.* Dennistoun (1871), 341.
M'Callum *v.* Glasgow District Subway Co. (1895), 265, 270, 271.
M'Carthy *v.* Metropolitan Board of Works (1872), 285.
M'Clymont's exrs. *v.* Osborne (1895), 396.
M'Clymont's trs. (1922), 239.
MacConnell *v.* Prill & Co. (1916), 33, 112, 113.
M'Connell *v.* Wright (1903), 56.
M'Corkindale *v.* Caledonian Rly. Co. (1893), 302.
MacCorquodale *v.* Bell (1876), 347.
M'Cowan *v.* Wright (1852), 348, 351.
M'Culloch *v.* Glasgow Corpn. (1918), 346.
M'Donald (1890), 367.
Macdonald *v.* City of Glasgow Bank (1879), 84, 85.
Macdonald *v.* Hedderwick & Co. (1901), 358.
M'Donald *v.* M'Donalds (1881), 347, 354.
  v. M'Lachlans (1831), 396.
Macdonald *v.* New York Life Insce. Co. (1903), 346, 354.
Macdonald's trs. *v.* Gordon (1909), 339.
Macdonald, Sons & Co., *in re* (1894), 60.
MacDougall (1886), 105; (1900), 204, 221, 224.
  v. Gardiner (1875), 139.
  v. M'Dougall (1902), 223.
M'Dougall's trs. *v.* Heinemann (1918), 338.
Macdowall (1916), 301.
Macdowall *v.* Russell (1824), 244.
M'Dowall and Houston *v.* Hamilton (1793), 181.
M'Ewan *v.* Malcolm (1867), 459.
M'Ewen (1829), 429.
M'Ewen *v.* City of Glasgow Bank (1879), 62, 84.
M'Fadzean's exr. *v.* M'Alpine & Sons (1907), 444.
Macfarlane *v.* Great North of Scotland Rly. Co. (1893), 346.
  v. Macfarlane (1896), 346.
  v. Monklands Rly. Co. (1864), 302.
  v. Nicoll (1864), 250, 251, 252.
Macfarlane & Co. *v.* Oak Foundry Co. (1883), 474, 476.
Macfarlane, Strang & Co. (1915), 129.
Macfie *v.* Callander and Oban Rly. Co. (1898), 309.
M'Gann *v.* M'Gann's trs. (1883), 415.
MacGillivray *v.* Mackintosh (1891), 166.
M'Gowan *v.* Robb (1862), 394, 397; (1864), 397.
M'Gown *v.* M'Kinlay (1835), 365.
Macgown's trs. *v.* Robertson (1869), 340.
M'Gregor (1752), 356.
MacGregor (1900), 364.
M'Gregor *v.* Forrester (1831), 393.
Macgregor *v.* North British Rly. Co. (1893), 284, 290.
MacHardy *v.* Steele (1902), 361.
M'Intosh *v.* M'Intosh (1812), 396.
Macintyre *v.* Miller (1900), 365.
M'Jannet *v.* Neilson (1894), 93.
Mack *v.* Jenkin (1814), 251.

M'Kay's *case* (1875), 100, 106 ; (1896), 78.
Mackellar *v.* Marquis (1840), 394, 395, 397.
Mackenzie *v.* Catton (1870), 201.
v. Coulthart (1889), 437.
v. Dingwall Mags. (1839), 437.
v. Gordon (1838), 387.
M'Kenzie *v.* Holte's Legatees (1781), 337.
Mackenzie *v.* Inverness and Aberdeen Rly. Co. (1866), 266, 269, 271, 274, 275.
v. Inverness and Ross-shire Rly. Co. (1861), 274.
v. Mackenzie's trs. (1916), 351.
M'Kenzie *v.* Ross (1823), 162.
Mackenzie and ors. *v.* Orr and ors. (1837–9), 390.
Mackenzie & Co., Ltd. (1916), 42, 45.
M'Keown *v.* Boudard Péveril Gear Co. (1896), 49.
Mackereth *v.* Wigan Coal and Iron Co., Ltd. (1916), 71.
Mackie *v.* M'Dowall (1774), 164.
v. Riddell (1874), 160.
M'Kie's Tutor *v.* M'Kie (1897), 332.
M'Kinnon, *Petr.* (1884), 4.
Mackinnon *v.* Monkhouse (1881), 249.
v. National S.S. Co. (1904), 345.
Mackintosh *v.* Fraser (1860), 257.
v. Ross (1873), 202, 402.
Mackison's tr. *v.* Burgh of Dundee (1909), 127.
Mackley's *case* (1875), 59.
M'Knight (1875), 239.
Maclachlan *v.* Cameron (1899), 578.
Maclagan's trs. *v.* Lord Advocate (1903), 365.
M'Laren *v.* Caledonian Rly. Co. (1893), 345.
v. City of Glasgow Union Rly. Co. (1878), 290.
v. Thomson (1917), 111.
M'Lauchlan *v.* Carson (1826), 431.
M'Laughlin *v.* Douglas and Kidston (1863), 352.
M'Lean (1838), 350, 429 ; (1892), 206, 234 ; (1902), 300.
M'Lean *v.* Auchinvole & Cuthbertson (1824), 258.
Maclean *v.* Moody (1858), 473.
Maclean's tr. *v.* Maclean of Coll's tr. (1850), 157.
Macleay *v.* Tait (1906), 51, 56, 57.
M'Leod (1820), 430.
v. Lewis Justices of Peace (1892), 432.
v. M'Leod (1744), 350, 351.
Macleod *v.* Speirs (1884), 429, 435.
v. Wilson (1837), 385.
M'Leod's trs. *v.* Macpherson (1883), 437, 438.
M'Lintock *v.* Campbell (1916), 82.
Macmillan *v.* Cameron (1897), 280.
v. Cooper (1924), 472.
M'Millan *v.* Le Roi Mining Co. (1906), 111.
Macmillan *v.* Suresh (1890), 473.
Macmillan & Co. *v.* Dent (1907), 469, 494.
M'Morland's trs. *v.* Fraser (1896), 57.
M'Nab *v.* Brown's trs. (1926), 340.
M'Naughtan *v.* Brunton (1882), 93.
M'Neill *v.* Scott (1866), 436.
Maconochie (1857), 240 ; (1885), 367, 370.
Macphee *v.* Glasgow Corpn. (1915), 346.
Macqueen *v.* Hay (1854), 258.
M'Whir *v.* Maxwell (1836), 356.
Mabe *v.* Connor (1909), 502.
Macey *v.* Metropolitan Board of Works (1864), 285.
Madden *v.* Currie's trs. (1842), 394, 395.
Magdalen College, *in re* (1901), 300.
Mahony *v.* East Holyford Mining Co. (1875), 26, 95.
Main *v.* Lanarkshire, etc. Rly. Co. (1895), 306.
Mains & M'Glashan *v.* Black (1895), 249.
Mair *v.* Rio Grande Rubber Estates (1913), 53.
Maitland-Davidson *v.* "Sphere and Tatler" (1919), 475.
Malcolm *v.* Campbell (1891), 449.
Malleson *v.* General Mineral Patents Syndicate (1894), 22.
v. National Insce. and Guarantee Corpn. (1894), 89.
Manchester, etc. Rly. Co. *v.* Anderson (1898), 280.
Mann *v.* Edinburgh Northern Tramways Co. (1891), 13, 15.
Mansell *v.* Valley Printing Co. (1908), 497.
Mansfield *v.* Glasgow, etc. Rly. Co. (1850), 299, 300.
Manuel's trs. (1893), 298.
Maple *v.* Army and Navy Stores (1882), 473.
Marino's *case* (1867), 81, 82.
Marks *v.* Beyfus (1890), 357.
Marmon, Ltd. *v.* Alexander (1908), 94.
Marquis *v.* Prentice (1896), 336.
Marsh *v.* Conquest (1864), 503.
Marshall (1695), 8.
Marshall *v.* Callander and Trossachs Hydropathic Co. (1895), 178 ; (1897), 456.
v. Glamorgan Iron and Coal Co. (1868), 87, 136.
Marshall, Sons & Co., *in re* (1919), 129.
Marshall's tr. *v.* Provan & Co. (1794), 156.
Marshall & Aitken *v.* Campbell's tr. (1889), 258.
Marson *v.* London, Chatham and Dover Rly. Co. (1868), 270.
Martin *v.* Ferguson's trs. (1892), 361, 364.
v. Leicester Waterworks Co. (1858), 275.
v. London, Chatham and Dover Rly. Co. (1866), 270, 271, 282, 308.
Martin's trs. *v.* Milliken (1864), 337, 397.
Marzetti's *case* (1880), 99.
Mason (1889), 367 ; (1904), 415.
Mason *v.* Benhar Coal Co. (1882), 59, 60.

Mason's trs. *v.* Poole & Robinson (1903), 15, 134, 136.
Massy *v.* Scott's trs. (1872), 397.
Master's *case* (1872), 83.
Matheson Bros. Ltd., *in re* (1884), 8.
Mathieson *v.* Scottish Trade Protection Soc. (1897), 352.
Matthews *v.* Munster (1887), 257.
  v. Auld & Guild (1874), 165.
Maude, *ex parte* (1870), 70.
Maudslay *v.* Maudslay, Sons & Field (1900), 144.
Maule (1876), 223, 224.
Maule *v.* Moncrieffe (1846), 265.
Mawman *v.* Tegg (1826), 506.
Maxton *v.* Brown (1839), 99.
Maxwell (1875), 68.
Maxwell *v.* Glasgow and South-Western Rly. Co. (1866), 289.
  v. Hogg (1867), 474.
  v. M'Culloch's crs. (1738), 152.
  v. Somerton (1874), 500.
May *v.* Thomson (1882), 452.
Mayfair Property Co., *in re* (1898), 144.
Maynard *v.* Consolidated Kent Collieries Corpn. (1903), 82.
Mearns *v.* Charles (1926), 397.
Mears *v.* Western Canada, etc. Co. (1905), 75.
Measures Bros. Ltd. *v.* Measures (1910), 105.
Meiklejohn *v.* Culross Mags. (1805), 545.
Mein *v.* Taylor (1827), 397.
Meldrum's trs. *v.* Clark (1826), 157.
Melville *v.* "Mirror of Life" Co. (1895), 486.
  v. Paterson (1842), 244.
Menell & Cie, *in re* (1915), 122.
Menier *v.* Hooper's Telegraph Works (1874), 110.
Menzies *v.* Macdonald (1864), 437.
Menzies' crs. *v.* Menzies (1738), 401.
Mercer *v.* Liverpool, etc. Rly. Co. (1904), 269.
Mercer *v.* Mercer (1730), 403.
Merchant Banking Co. of London *v.* Merchants' Joint Stock Bank (1878), 27.
Messager *v.* British Broadcasting Co. (1927), 503.
Metal Constituents, Ltd., *in re* (1902), 52, 66.
Methven's exrs. *v.* Edinburgh, Perth and Dundee Rly. Co. (1851), 279, 297, 299.
Metropolitan Board of Works *v.* M'Carthy (1874), 286, 287.
Metropolitan Coal, etc. Assce. *v.* Scrymgeour (1895), 32.
Metropolitan, etc. Rly. Co. and Cosh, *in re* (1880), 289, 310.
Metropolitan Water Board *v.* Berton (1921), 312.
  v. Dick, Kerr & Co. (1918), 460.
Metzler *v.* Wood (1878), 475.
Meux's Brewery Co., *in re* (1919), 44.
Michael *v.* Edinburgh Corpn. (1895), 268.
Middlemas *v.* Gibson (1910), 154.
Middleton *v.* Earl of Strathmore (1742), 163.
  v. Leslie (1892), 456.
  v. Paterson (1774), 409.
Midland Counties District Bank *v.* Attwood (1905), 105.
Midland Rly. Co., *ex parte* (1904), 299, 305.
  v. Great Western Rly. Co. (1909), 305.
  v. Miles (1885), 293.
  v. Robinson (1889), 292, 293.
  v. Wright (1901), 309.
Midlothian County Council *v.* Musselburgh Mags. (1911), 561.
Midwinter *v.* Hamilton (1748), 467.
Mighell *v.* Sultan of Johore (1894), 447.
Migotti's *case* (1867), 58.
Miles *v.* Finlay & Co. (1830), 138.
  v. Great Western Rly. Co. (1896), 275.
  v. North British Rly. Co. (1867), 242, 299, 302.
Milford Haven Fishing Co. *v.* Jones (1895), 29.
Mill *v.* Nicol (1767), 356.
  v. Paul (1825), 157.
Millar *v.* Aikman (1891), 69.
  v. Small (1856), 350.
  v. Taylor (1769), 467.
Millar's trs. *v.* Millar (1893), 331, 332, 334.
Millen and Somerville *v.* Millen (1910), 60.
Miller (1838), 430.
  v. Bain (1879), 436.
  v. Downie (1876), 248, 249.
  v. M'Nair (1852), 165.
  v. Miller (1831), 402; (1833), 396.
  v. Mitchell (1835), 431.
  v. Oliphant (1843), 444.
  v. Wright (1836), 245.
Milligan (1927), 299.
  v. Broadway Cinema Productions, Ltd. (1923), 482.
Milligan's Judicial Factor *v.* Milligan (1910), 331, 332, 333.
Mills *v.* Kelvin and James White, Ltd. (1912), 357.
  v. Northern Rly. of Buenos Ayres (1870), 121.
Miln *v.* Arizona Copper Co. (1899), 123.
  v. North British Fresh Fish Supply Co. (1887), 60, 62.
Minet *v.* Morgan (1873), 347, 348.
Missouri S.S. Co., *in re* (1889), 460.
Mitchell *v.* Beewick (1843), 352.
  v. Canal Basin Foundry Co. (1869), 164.
  v. City of Glasgow Bank (1878), 66, 72, 84; (1879), 82.
  v. Croydon Justices (1914), 355.
  v. Mackersy (1905), 164.
  v. Mitchell (1877), 396.
Moffat and Paige *v.* Gill & Sons (1901), 474, 499.
Moffatt *v.* Farquhar (1877), 83.

Moir *v.* Duff & Co. (1900), 90.
Molineaux *v.* London, Birmingham and Manchester Insce. Co. (1902), 93.
Möller *v.* Maclean (1889), 91.
Molleson and Grigor *v.* Fraser's trs. (1881), 15, 58.
Monaghan (1844), 355.
Monaghan *v.* Taylor (1885), 496, 503.
Monckton *v.* Gramophone Co. (1912), 502.
v. Pathé Frères Pathephone, Ltd. (1914), 519, 520.
Moncreiffe (1859), 301.
Moncrieff *v.* Edinburgh and Glasgow Rly. Co. (1857), 300.
Moncrieff, Sir A., *v.* Lord Moncrieff (1907), 201.
Moncrieffe *v.* Perth Harbour Commrs. (1843), 268, 269.
Monroe *v.* Twistleton (1803), 354.
Montgomery *v.* Liebenthal (1898), 8.
Montreal and St. Lawrence Light, etc. Co. *v.* Robert (1906), 89.
Montrose Asylum *v.* Brechin District Cte. (1900), 565.
Montrose Mags. *v.* Robertson (1738), 331, 336.
Moody *v.* Corbett (1866), 310.
Moore *v.* Rawlins (1859), 86.
Moore Bros. & Co., Ltd. (1899), 60.
Moores *v.* Moores (1899), 349.
Moreton's trs. *v.* Moreton (1854), 203.
Morgan (1884), 115.
Morgan *v.* Metropolitan Rly. Co. (1868), 269.
Morison *v.* Miller (1818), 221.
Morley (John) Building Co. *v.* Barras (1891), 91, 109.
Morrell *v.* Oxford Portland Cement Co. (1910), 94.
Morris *v.* Ashbee (1868), 473, 499.
v. Wright (1870), 473, 499.
Morrison *v.* Edinburgh Fleshers (1853), 546.
v. Harrison (1876), 85.
v. Somerville (1860), 350.
Morrison (W.) & Co. (1892), 41.
Morrison & Mason, Ltd. *v.* Clarkson Bros. (1896), 345.
Morrison's trs. *v.* Macdonald (1890), 338.
Morton, Earl of, *v.* Edinburgh Mags. (1917), 301.
v. Fleming (1921), 352.
Morton (George), Ltd. (1900), 46.
Morton's trs. *v.* Robertson's Judicial Factor (1892), 252.
Mosely *v.* Koffyfontein Mines, Ltd. (1910), 103.
v. Victoria Rubber Co. (1886), 352.
Motherwell *v.* Manwell (1903), 386, 387.
Moul *v.* Groenings (1891), 516.
Mount Morgan (West) Gold Mines (1887), 54.
Mount Morgan (West) Gold Mines liqr. *v.* M'Mahon (1891), 87.
Mousell Bros. *v.* London and North-Western Rly. Co. (1917), 138.
Mowat *v.* Aberdeen Tailors (1825), 543.
Mowbray *v.* Scougall (1834), 337.
Moyes *v.* Whinney (1863), 9.
Muckarsie *v.* Wilson (1824), 355.
Muir (1886), 367 ; (1906), 366.
Muir *v.* Calder (1635), 387.
v. Caledonian Rly. Co. (1890), 287.
v. City of Glasgow Bank (1878), 3, 4, 542, 543.
v. Edinburgh and District Tramways Co. (1909), 346, 357.
v. Milligan (1868), 433.
v. Muir (1588), 178.
v. Scott (1825), 253.
Muir and Milliken *v.* Kennedy (1697), 154.
Muirhead *v.* Forth and North Sea Steamboat Mutual Insce. Assoc. (1893), 89, 90, 136.
v. Paterson (1824), 394.
Mulliner *v.* Midland Rly. Co. (1879), 309, 310.
Municipal Freehold Land Co. *v.* Pollington (1890), 100, 103.
Munro *v.* Fraser (1858), 348.
v. Hutchison (1896), 140.
v. Macdonald's exrs. (1866), 155.
v. Matheson (1877), 435.
Munro (Robert A.) & Co. (1913), 37.
Munro's exrs. *v.* Munro (1890), 331, 333.
Murdoch *v.* Caledonian Rly. Co. (1906), 282.
Murphy *v.* Smith (1920), 256.
Murray (1861), 367 ; (1920), 297.
Murray *v.* Blair (1739), 394.
v. Kyd (1852), 258.
v. M'Guffog (1711), 154.
v. Neilson & Lanirk (1728), 389.
v. Parlane's trs. (1890), 387, 390.
v. Rennie & Angus (1897), 450.
Murray's crs. *v.* Chalmer (1744), 154.
Musselburgh Mags. *v.* Brown (1804), 178.
Mutlow's estate, *in re* (1878), 305.
Mutter *v.* Eastern and Midland Rly. Co. (1888), 64.
Myles *v.* Calman (1857), 394.
v. City of Glasgow Bank (1879), 84, 85.

Nairn's trs. *v.* Melville (1877), 341.
Nant-y-glo and Blaina Iron Works Co. *v.* Grave (1878), 100.
Napier *v.* Orr (1868), 401.
Napier and Ettrick's tr., Lord, *v.* de Saumarez (1900), 203, 211, 244, 245.
Nassau Phosphate Co., *in re* (1876), 18.
Nassau Steam Press *v.* Tyler (1894), 138.
Natal Land, etc. Co. *v.* Pauline Colliery, etc. Syndicate (1904), 134.
Nation's *case* (1866), 82, 83, 84.
National Bank of Australasia *v.* Turnbull & Co. (1891), 452.
National Bank of China *v.* Poole (1907), 45.
National Bank of Wales, *in re,* 1897, 84.
National Boiler Insce. Co., *in re* (1892), 128.

National Debenture and Assets Corpn., *in re* (1891), 17.
National Dwellings Society, Ltd. (1898), 37, 42.
National Dwellings Society *v.* Sykes (1894), 110.
National Exchange Co. of Glasgow *v.* Drew (1855), 97 ; (1860), 104.
National Funds Assurance Co., *in re* (1878), 99, 100, 123.
National House Property Investment Co. *v.* Watson (1908), 60, 74, 77.
National Motor Mail Coach, *in re* (1908), 15, 16, 75.
National Savings Bank Assoc., *in re* : Hebb's *case* (1867), 450.
National Trustee Co. of Australasia *v.* General Finance Co. of Australasia (1905), 101.
Neale *v.* City of Birmingham Tramways Co. (1910), 38.
  v. Gordon-Lennox (1902), 257.
Neath, etc. Rly. Co., *ex parte* (1876), 305.
Neil *v.* Inglis (1833), 251.
Neil's trs. *v.* British Linen Co. (1898), 250.
Neill's *case* (1869), 87.
Neilson *v.* Ayr Race Meetings Syndicate, Ltd. (1918), 81.
Neilson *v.* Cochrane's reprs. (1837), 210.
  v. Horniman (1909), 494.
  v. Murray (1732), 394.
Nelson *v.* Anglo-American Land Mortgage Agency Co. (1897), 115.
  v. Fraser (1906), 60.
Neuschild *v.* British Equatorial Oil Co. (1925), 113.
Neville *v.* Shepherd (1895), 342.
New Balkis Eersteling, Ltd. *v.* Randt Gold Mining Co. (1904), 70, 87.
New Brunswick and Canadian Rly. Co. *v.* Conybeare (1862), 53, 55, 97.
New Chile Gold Mining Co., *in re* (1890), 86.
New Eberhardt Co., *in re* (1890), 74.
New Mashonaland Exploration Co., *in re* (1892), 98.
New Mining and Exploring Syndicate *v.* Chalmers & Hunter (1909), 140.
New Moss Colliery *v.* Manchester Corpn. (1908), 292.
New University Club, *in re* (1887), 538, 539.
New Westminster Brewery Co., *in re* (1911), 129.
New York Breweries Co. *v.* Att.-Gen. (1899), 371.
New Zealand and Australian Land Co. (1881), 45.
New Zealand Co. *v.* Peacock (1894), 69.
Newlands *v.* His Creditors (1794), 396.
  v. Newland's crs. (1798), 223.
Newman & Co., *in re* (1895), 16, 94, 100.
Newspaper Proprietary Syndicate, Ltd., *in re* (1900), 105.
Newton *v.* Anglo-Australian, etc. Co. Debenture Holders (1895), 143.
  v. Birmingham Small Arms Co. (1906), 118, 124.
Nicol (1859), 53, 54, 102 ; (1885), 58, 59.
  v. Dundee Harbour trs. (1914), 125.
  v. Nicol's exrs. (1876), 337, 341.
Nicols *v.* Pitman (1884), 470, 477, 498.
Nicolson (1871), 373.
Nicolson *v.* Nicolson (1899), 404.
  v. Nicolson's testatrix (1922), 335.
Nimmo (1839), 429.
Nisbet *v.* Balfour (1741), 415.
Nisbet-Hamilton *v.* North British Rly. Co. (1886), 290.
  v. Northern Lighthouses Commrs. (1886), 279.
Niven *v.* Collins Patent Gear Co. (1900), 16.
Nixon's Navigation Co., *in re* (1897), 40.
Noble *v.* Scott (1843), 349.
Nordberg (J. & A.) Ltd., *re* (1915), 36, 128.
Norey *v.* Keep (1909), 64.
Norfolk, Duke of, *v.* Billers (1739), 225.
Normanshaw *v.* Normanshaw (1893), 353.
North Berwick Kirk Session *v.* Sime (1839), 541.
North British Building Co. (1882), 55.
North British Rly. Co. *v.* Benhar Coal Co. (1886), 267.
  v. Birrell's trs. (1918), 309, 311.
  v. Budhill Coal Co. (1909), 293.
  v. Edinburgh Mags. (1893), 302.
  v. Forth Bridge Rly. Co. (1922), 293.
  v. Lindsay (1875), 269, 280.
  v. Moon's trs. (1879), 309.
  v. Tod (1846), 265.
  v. Turners, Ltd. (1904), 291.
North Charterland, etc. Co. *v.* Riordan (1896), 32.
North Cheshire Brewery Co., *in re* (1920), 35, 37.
North Cheshire and Manchester Brewery Co. *v.* Manchester Brewery Co. (1899), 27.
North Eastern Insce. Co., *re* (1919), 102.
North of England Iron Steamship Insce. Assoc., *in re* (1900), 129.
North of England Steamship Co., *in re* (1905), 113.
North of Scotland Banking Co. *v.* Duncan (1857), 546.
North of Scotland and Orkney and Shetland Steam Navign. Co. (1920), 109, 112, 113, 128, 129, 130, 132.
North Sydney Investment, etc. Co. *v.* Higgins (1899), 134.
North-West Transportation Co. *v.* Beatty (1887), 100, 112.
Northern Counties Bank, *in re* (1883), 101.
Northern Accident Insce. Co. (1893), 28, 128, 130.
Northern Garage, Ltd. *v.* North British Motor Mfg. Co. (1908), 345.

Northesk, Earl of, *v.* Cheyn (1680), 350.
v. Gairn's Tutors (1670), 163.
Northsenton's crs. *v.* Eliot (1720), 394.
Northumberland, Duke of, *v.* Harris (1832), 435.
Northumberland Avenue Hotel Co., *in re* (1886), 134.
Northwick, *ex parte* (1834), 297.
Norton *v.* Anderson (1893), 179.
v. London and North-Western Rly. Co. (1879), 310.
Norwich Yarn Co. (1856), 26.
Nottage *v.* Jackson (1883), 486.
Novello *v.* Ludlow (1852), 498.

Oakbank Oil Co. *v.* Crum (1882), 25, 26, 69, 109, 123.
Oakes *v.* Turquand (1867), 52, 54, 64, 449.
Oban Town Council *v.* Callander, etc. Rly. Co. (1892), 284, 290.
Oban and Aultmore Distilleries Co. (1903), 44.
O'Brien's *case* (1923), 67.
O'Connor *v.* Marjoribanks (1842), 354.
Odessa Tramways Co. *v.* Mendel (1878), 69.
O'Donnell *v.* Clinton, 442.
Ogilvy *v.* Ogilvy (1817), 210.
Oliver *v.* Wilkie (1901), 166.
Olympia, Ltd., the (1898), 14.
Omnium Electric Palaces *v.* Baines (1914), 14.
One and All Sickness, etc. Assce. Assoc. (1909), 12.
Onslow's *case* (1888), 93.
Ooregum Gold Mining Co. of India *v.* Roper (1892), 73, 74, 77, 128.
Oppenheimer *v.* British and Foreign Exchange Investment Bank (1877), 46.
Oregon Mortgage Co. (1910), 40.
Ormerod's *case* (1894), 32.
Orr *v.* Glasgow, Airdrie, etc. Rly. Co. (1860), 96, 110, 139.
Osbourne *v.* Dent (1925), 491.
Osgood *v.* Nelson (1872), 103.
Oswald (1875), 297.
Oswald *v.* City of Glasgow Bank (1879), 85.
"Otto" Electrical Manufacturing Co., *in re*; Clinton's Claim (1908), 135; Jenkins' Claim (1906), 114, 135.
Overend and Gurney Co. *v.* Gibb (1872), 98.
Oxford Benefit Building, etc. Society (1886), 100, 120.
Oxted Motor Co., *in re* (1921), 112.

Pacific Coast Coal Mines, Ltd. *v.* Arbuthnot (1917), 109, 112, 125.
Page *v.* International Agency, etc. Trust (1893), 143.
v. Wisden (1869), 474.
Palace Billiard Rooms *v.* City Property Investment Co. (1912), 47.
Palace Hotel, Ltd., *re* (1912), 36, 37.
Palumbo (1870), 367.
Panhard et Levassor Co. *v.* Panhard Levassor Motor Co. (1901), 27.
Paolo *v.* Parias (1897), 166.
Parbury's *case* (1896), 77, 78.
Parent Tyre Co., *in re* (1923), 128, 130.
Park *v.* Royalties Syndicate (1912), 20.
Parker (1881), 364.
Parker, *ex parte* (1867), 83.
Parker *v.* M'Kenna (1874), 100.
Parker & Co. (Sandbank), Ltd. *v.* Western Assce. Co. (1925), 140.
Parker & Cooper, Ltd. *v.* Reading (1926), 95, 100.
Park's curator *v.* Black (1870), 412.
Parkins *v.* Hawkshaw (1817), 349.
Parlement Belge, The (1880), 447.
Partick, Hillhead, and Maryhill Gas Co. *v.* Taylor (1888), 123; (1891), 124.
Partridge *v.* Albert Life Assce. Co. (1872), 105.
Patent File Co., *in re* (1870), 127, 142, 143.
Patent Invert Sugar Co., *in re* (1885), 35, 89.
Patent Ventilating Granary Co. (1879), 46.
Paterson *v.* Balfour (1780), 394.
v. Edington (1830), 443.
v. M'Farlane (1875), 70.
v. Paterson (1897), 444.
v. Paterson & Sons (1917), 123.
v. Robson (1872), 435.
Paterson's trs. *v.* Caledonian Heritable Sec. Co. (1885), 127, 142, 143.
Pathé Frères, *ex parte* (1914), 32.
Paton *v.* Barclay (1627), 161.
Pattison *v.* Dunn's trs. (1866), 412.
v. Fitzgerald (1823), 437.
Paul *v.* Black (1820), 253.
v. Laing (1855), 351.
Paul's tr. *v.* Thomas Justice & Sons, Ltd. (1912), 71.
Paull *v.* Forbes (1911), 393.
Payne's *case* (1869), 83.
Peacock *v.* Glen (1826), 204.
Pearks, Gunston and Tee, Ltd. *v.* Ward (1902), 138.
Pearse *v.* Pearse (1846), 347, 348.
Pearson (1877), 100.
Pearson *v.* Anderson Bros. (1897), 344.
v. Great Northern Rly. Co. (1869), 277.
Peddie *v.* Brown (1857), 281.
Peebles *v.* Watson (1825), 246.
Peebles Hotel Hydropathic (1920), 37.
Peek *v.* Gurney (1873), 49, 52.
Peel (1867), 18.
Peel *v.* London and North-Western Rly. Co. (1907), 111.
Peele *v.* Northcote (1817), 165.
Pelican Fire, etc. Insce. Co., Ltd. liqr. *v.* Bruce (1904), 73.
Pell *v.* Northampton, etc. Rly. Co. (1866), 304.
Pellatt's *case* (1867), 60, 77.
Penarth Pontoon Co., *re* (1911), 113.

Pender *v.* Lushington (1877), 83, 111.
Penny, *in re* (1857), 287.
Penny *v.* Penny (1868), 287.
Penrose *v.* Martyr (1858), 28, 138.
Pentelow's *case* (1869), 60.
Percival *v.* Peterborough Corpn. (1921), 314.
  v. Wright (1902), 96.
Percy *v.* Glasgow Corpn. (1922), 546.
Performing Right Society *v.* Ciryl Syndicate (1924), 496, 503.
Perles *v.* Wycombe Rly. Co. (1862), 304.
Peruvian Rlys. Co. *v.* Thames and Mersey Marine Insce. Co. (1867), 126, 137.
Peterhead Mags. *v.* Aberdeenshire County Council (1899), 576, 579.
Petrie *v.* Angus (1889), 434.
Phillips *v.* Alhambra Palace Co. (1901), 455.
Piercy, *re* (1907), 38.
Piercy *v.* Mills & Co. (1920), 96.
Pike *v.* Nicholas (1870), 498.
Pinchin *v.* London and Blackwall Rly. Co. (1854), 289.
Pinckney & Sons S.S. Co. (1892), 42.
Pitman *v.* Hine (1884), 473.
Planché *v.* Braham (1837), 501.
Plantation Trust *v.* Bela (Sumatra) Rubber Lands Co. (1916), 91.
Plaskynaston Tube Co., *in re* (1883), 44.
Plunkett *v.* Cobbett (1804), 355.
Pole's *case* (1920), 32.
Pollok *v.* Glasgow Waterworks Commrs. (1869), 300.
Poole, Jackson & Whyte's *case* (1878), 70.
Poole's *case* (1878), 96.
Poole *v.* National Bank of China (1907), 38, 41.
Porter *v.* Freudenberg (1915), 447.
Porterfield *v.* Graham (1779), 396.
Portsmouth Tramways Co., *in re* Borough of (1892), 6.
Portuguese Consolidated Copper Mines (1889), 102; (1890), 102.
Postage Stamp Automatic Delivery Co. (1892), 100.
Potter *v.* Hamilton and Strathaven Co. (1864), 287.
Powell *v.* Head (1879), 512.
Prefontaine *v.* Grenier (1907), 97.
Premier Briquette Co. *v.* Gray (1922), 32.
Premier Industrial Bank *v.* Carlton Mfg. Co. and Crabtree, Ltd. (1909), 137.
Premier Underwriting Assoc. (No. 1) (1913), 68.
Premier Underwriting Assoc. (No. 2) (1913), 23.
Preston's trs. *v.* Preston (1860), 391.
Primrose *v.* Caledonian Rly. Co. (1848), 300.
Pringle's crs. *v.* Erskine (1714), 394.
Printer and Stationer, H.M. (1790), 477, 478.
Printer, King's (1823–6), 477.
Pritchard's *case* (1872), 74.
Proctor *v.* Smiles (1886), 348.
Property Investment Co. of Scotland *v.* Duncan (1887), 65.
Puddephatt *v.* Leith (1916), 110.
Pulbrook *v.* Richmond, etc. Consolidated Mining Co. (1878), 104.
Pullen, *in re* (1882), 274.
Pulling *v.* London, Chatham and Dover Rly. (1864), 270.
Pulsford *v.* Richards (1853), 48.
Punt *v.* Symons & Co. (1903), 89, 96.
Purdie *v.* Ross (1707), 395.
Purves *v.* Gilchrist (1905), 357.
  v. Strachan (1677), 178.
Pyle Works, *in re* (1890), 30, 143, 144.
Pyle Works (No. 2), *in re* (1891), 102, 114.

Quebrada Railway Land, etc. Co. (1889), 40, 42.
Queenborough Corpn. *v.* Sheppey Rural Council (1915), 561.
Queensberry, Duke of, *v.* Shebbeare (1758), 468.
Queensland Mercantile and Agency Co., Ltd. *v.* Australasian Investment Co., Ltd. (1888), 8, 9, 70.
Queensland Mercantile and Agency Co., *in re* (1891), 144.
Quin & Axtens *v.* Salmon (1909), 96, 112, 139.
Quinton *v.* Bristol Corpn. (1874), 268.

R. *v.* Birmingham Rly. Co. (1850), 268.
  v. Byron (1852), 275.
  v. "Daily Mirror" (1927), 431.
  v. Daily Mirror Newspapers, Ltd. (1922), 138.
  v. Duchess of Kingston (1776), 353.
  v. Gazard (1838), 355.
  v. Gilham (1828), 353.
  v. Great Northern Rly. Co. (1876), 308.
  v. Great Western Rly. Co. (1852), 267.
  v. Griffin (1853), 353.
  v. Hammond & Co. (1914), 138.
  v. Harvey (1858), 355.
  v. Hay (1860), 353.
  v. Hungerford Market Co. (1832), 269.
  v. Kennedy (1893), 308.
  v. Lambourn Valley Rly. Co. (1889), 82.
  v. Lawson (1905), 106.
  v. London and South-Western Rly. Co. (1848), 270.
  v. Metropolitan Board of Works (1869), 286.
  v. Middlesex Clerk of the Peace (1914), 282.
  v. Registrar of Companies (1912), 28.
  v. St. Luke's Vestry, Chelsea (1871), 264.
  v. Smith; *in re* Westfield and Metropolitan Rly. Cos. (1883), 277.
  v. Waddington (1822), 475.
  v. Westminster High Bailiff (1903), 277.
  v. Wimbledon Local Board (1882), 111.
  v. Woodfall (1770), 356.

Radcliffe *v.* Glasgow, etc. Rly. Co. (1847), 305.
Rae *v.* Clerk (1738), 163.
  v. Rae (1810), 403.
Raeburn *v.* Geddes (1870), 282.
Railway Sleepers Supply Co., *in re* (1885), 112.
Rainford *v.* Keith (James) and Blackman Co. (1905), 78.
Rait *v.* Galloway (1833), 443.
Ralli Bros. *v.* Compañia Naviera Sota y Aznar (1920), 461.
Ramsay (Wardlaw) (1903), 299.
Ramsay *v.* Bank of Scotland (1729), 390.
  v. Maxwell (1612), 394.
  v. Nairn (1708), 385.
  v. Ramsay (1682), 394.
Ramskill *v.* Edwards (1886), 98.
Rance's *case* (1870), 100, 120, 123.
Ranger *v.* Great Western Rly. Co. (1854), 52, 133.
Rankine *v.* Logie Den Land Co. (1902), 456.
  v. Rankine's trs. (1904), 332, 334.
Rashdall *v.* Ford (1866), 97.
Ray *v.* Walker (1892), 309.
Rees *v.* Melville (1914), 502.
Reese River Silver Mining Co., *in re* (1867), 98.
  v. Smith (1869), 58.
Regent's Canal and Dock Co. *v.* London County Council (1912), 270.
Reichardt *v.* Sapte (1893), 498, 502.
Reid (1873), 366.
Reid *v.* Bell (1884), 154.
  v. Dobie (1921), 365.
  v. Reid (1827), 395.
Reid Gear Co. *v.* Renfrew Lower District Cte. (1923), 565.
Reid & Laidlaw, Ltd. *v.* Laidlaw (1905), 259.
Reigate *v.* Union Manufacturing Co. (Ramsbottom) (1918), 105.
Rendle *v.* Rendle & Co. (1890), 27.
Renouf's trs. *v.* Haining (1919), 393.
Renton *v.* Anstruther (1843), 227; (1848), 177.
Renton (Lord) *v.* Feuars of Coldingham (1666), 178.
Renton *v.* North British Rly. Co. (1845), 271, 304.
Rentoun *v.* Home (1670), 390.
Reuss, Princess of, *v.* Bos (1871), 18.
Reuter *v.* Douglas (1902), 443.
Reversion Fund and Insce. Co. *v.* Maison Cosway (1913), 142.
Reversionary Interest Society, *in re* (1892), 128, 130, 131, 142.
Reynell *v.* Lewis (1846), 15.
Rhind's trs. *v.* Leith (1866), 337, 338.
Rhys *v.* Dare Valley Rly. Co. (1874), 306.
Richard and Great Western Rly. Co., *in re* (1905), 293.
Richards *v.* Home Assce. Assoc. (1871), 60.
Richardson *v.* English Crown Spelter Co. (1885), 122.
  v. Wilson (1879), 432.
Richmond (1858), 96.
Richmond *v.* North London Rly. Co. (1868), 272.
Richmond Hill Hotel, *in re* (1867), 60.
Rickett *v.* Metropolitan Rly. Co. (1867), 286.
Riddell *v.* Glasgow Corpn. (1910), 104, 133, 546.
  v. Lanarkshire and Ayrshire Rly. Co. (1904), 275.
Ridgway *v.* Wharton (1856), 445.
Ritchie *v.* Leith Dock Commrs. (1902), 345.
Ritso's *case* (1877), 59, 60.
Rixon *v.* Edinburgh Northern Tramways Co. (1890), 95, 134.
Roberts *v.* City of Glasgow Bank (1878), 85.
Robertson *v.* Ainslie's trs. (1837), 253.
  v. British Linen Co. (1891), 30, 79, 85, 128.
  v. Davidson (1751), 390.
  v. Duke of Athole (1806), 397.
  v. Ferguson (1820), 251.
  v. Fleming (1861), 454.
  v. Lord Halkerton (1675), 401.
  v. Hamilton (1915), 358.
  v. M'Donald (1829), 438.
Robinson *v.* Chartered Bank (1865), 83.
  v. Davison (1871), 459.
Robison *v.* Robison (1859), 402.
Robl *v.* Palace Theatres (1911), 502.
Robson *v.* Premier Oil and Pipe Line Co. (1915), 110.
  v. Stirling (1908), 452.
Robson and Sharpe *v.* Drummond (1831), 455.
Rodgers *v.* Edinburgh Tailors Incorpn. (1842), 545, 546.
Roger's *case* (1872), 83.
Rollo *v.* Ramsay (1832), 394.
Romford Canal Co., *in re* (1883), 110.
Ronaldson *v.* Williamson (1911), 582.
Rose *v.* Medical Insce. Soc. (1847), 344.
Rosebery, Earl of, (1888), 298.
Ross (1833), 364; (1859), 352; (1892), 374.
Ross *v.* Clyde Navigation Trs. (1869), 267.
  v. Gibbs (1869), 349.
  v. Glasgow Corpn. (1918), 346.
  v. King (1847), 397.
  v. Ross (1885), 433; (1895), 155.
  v. Tain Mags. (1711), 154.
Ross and Frank Co. *v.* Crompton (J. R.) & Bros., Ltd. (1923), 442.
Ross, Skolfield & Co. *v.* State Line S.S. Co. (1875), 97, 143.
Rossi *v.* Edinburgh Corpn. (1904), 583.
Rossiter *v.* Miller (1877), 445.
Rosslyn, Earl of, *v.* Lawson (1872), 415.
Rossmore's trs. *v.* Brownlie (1877), 177.
Rotherham Alum and Chemical Co., *in re* (1883), 104, 114.
Roughhead (1794), 341.

Roussell *v.* Burnham (1909), 75.
Routledge (George) & Sons, *in re* (1904), 146
Routledge *v.* Low (1868), 522.
Rowand *v.* Campbells (1824), 182, 246.
Rowell *v.* Rowell & Sons, Ltd. (1912), 39, 41, 88.
Roxburgh, Duke of, *v.* Wauchope (1825), 389.
Roxburghe, Duke of, *v.* Chatto (1753), 350.
Royal Bank of India's *case* (1869), 136.
Royal British Bank *v.* Turquand (1856), 26, 95, 102, 133, 136, 142.
Royal Exchange Bldgs., Glasgow, Proprs. of (1911), 17, 128, 131, 132.
Ruabon Brick, etc. Co. *v.* Great Western Rly. Co. (1893), 292.
Ruben *v.* Great Fingall Consolidated (1906), 26, 77, 104, 105, 133, 136.
Ruby Consolidated Mining Co. (1874), 54.
Rugby Portland Cement Co. *v.* London and North-Western Rly. Co. (1908), 293.
Rule *v.* Pardie (1710), 235.
Russel *v.* Simes (1791), 415.
Russell *v.* Briant (1849), 503.
v. M'Nab (1824), 162, 165.
v. Rudd (1923), 260.
v. Russell (1874), 240.
v. Smith (1848), 480, 504.
v. Wakefield Waterworks Co. (1875), 139.
Russian Spratts, Ltd., *in re* (1898), 143.
Rutherford (1883), 366.
Rutherford Tobacco Co. *v.* Lusby (1902), 92.
Ruthven *v.* Hamilton's Curator Bonis (1881), 298.
Ryan *v.* Mutual Tontine Westminster Chambers Assoc. (1893), 456.

Sadgrove *v.* Phillips (1907), 111.
St. Hilda's Incorporated College, Cheltenham (1901), 24.
St. Mungo Manufacturing Co. *v.* Hutchison, Main & Co. (1908), 432.
St. Pancras Burial Ground, *in re* (1866), 299.
Salmon *v.* Padon & Vannan (1824), 162.
v. Quin & Axtens, Ltd. (1909), 96, 112, 139.
Salomon *v.* Salomon (1897), 17, 20, 25.
Salt Mines Syndicate (1895), 144, 149.
Saltoun *v.* Great North of Scotland Rly. Co. (1906), 300.
Sanders *v.* Sanders' trs. (1879), 4.
Sandwell Park Colliery Co., *in re* (1914), 129.
Sanitary Carbon Co., *in re* (1877), 110.
Sankey Brook Coal Co., *in re* (1870), 143, 144.
Saunderton Glebe Lands, *in re* (1903), 299.
Sawers *v.* Balgarnie (1858), 354.
Scadding *v.* Lorant (1850), 109.
Schauer *v.* Field (1893), 516.
Schove *v.* Schminke (1886), 474.
Schweppes, Ltd., *re* (1914), 36, 37.
Schwinge *v.* London and Hackwall Rly. Co. (1855), 270.
Scott (1854), 367 ; (1856), 233, 240.
Scott *v.* Caledonian Rly. Co. (1904), 293.
v. Campbell (1834), 252, 253.
v. Craig's reprs. (1897), 260.
v. Crombie (1826), 396.
v. Dunoon Mags. (1909), 290.
v. Edinburgh, etc. Rly. Co. (1848), 290.
v. Hall & Bisset (1809), 162.
v. Lord Napier (1637), 350.
v. Money Order Co. of Great Britain and Ireland (1870), 13, 15, 16.
v. Portsoy Harbour Co. (1900), 345.
v. Stanford (1867), 497, 499.
Scott's tr. *v.* Scott (1887), 158.
Scottish Accident Insce. Co. (1896), 28, 128, 130.
Scottish American Investment Co. (1891), 28, 128, 130.
Scottish Drainage Co. *v.* Campbell (1889), 6.
Scottish Employer's Liability and Accident Assce. Co. (1896), 28, 128, 130, 132.
Scottish Heritages Co. liqr. (1898), 74, 77.
Scottish India Rubber Co. (1920), 37.
Scottish Insce. Commrs. *v.* Edinburgh Royal Infirmary (1913), 487.
Scottish Investment Trust (1901), 123.
Scottish Investment Trust Co., Ltd. *v.* Inland Revenue (1893), 12.
Scottish Lands and Buildings Co. *v.* Shaw (1880), 443.
Scottish Manitoba and North-West Real Estate Co. (1892), 41.
Scottish Midland Junction Rly. Co. *v.* Gray (1850), 266.
Scottish North-Eastern Rly. Co. *v.* Napier (1859), 154.
v. Stewart (1859), 267.
Scottish Pacific Coast Mining Co. *v.* Falkner, Bell & Co. (1888), 14, 100.
Scottish Petroleum Co., *in re* (1883), 53, 54, 55, 59, 64, 65, 102.
Scottish Poultry Journal Co. (1896), 105, 106.
Scottish Power Co. (1907), 44.
Scottish Provident Institution *v.* Cohen & Co. (1888), 79, 85, 144.
Scottish Queensland Mortgage Co. (1908), 42.
Scottish Union and National Insce. Co. (1909), 27.
Scottish Vulcanite Co. (1894), 41.
Scougall *v.* Ker (1762), 163.
Sea Insurance Co. of Scotland *v.* Gavin (1827), 3.
Seaforth trs. *v.* Macaulay (1844), 456.
Second Edinburgh Starr-Bowkett Bldg. Soc. *v.* Aitken (1892), 17.
Seeley *v.* Fisher (1841), 474.
Selkirk, Earl of, *v.* Duke of Hamilton (1740), 413.
Sellar *v.* Highland Rly. Co. (1919), 274.
Seton (1683), 154.

Sewell's *case* (1868), 54, 59, 64.
Sharp *v.* Dawes (1876), 110.
Sharpe, *in re* (1892), 100, 123.
Shandon Hydropathic Co. (1911), 259.
Shaw *v.* Caledonian Rly. Co. (1890), 62.
    v. City of Glasgow Bank (1878), 66.
    v. Kay (1904), 358.
    v. Tati Concessions (1913), 111.
    v. Wright (1877), 445.
Sheffield Corpn. *v.* Barclay (1905), 78.
Sheffield (Earl of) *v.* London Joint Stock Board (1888), 79.
Shepheard *v.* Browne (1904), 56, 57, 136.
Shepherd *v.* Conquest (1856), 486.
    v. Norwich Corpn. (1885), 271, 273.
    v. Robinson (1919), 257.
Sheridan *v.* Peel (1907), 357, 358, 359.
Sheriff (1811), 258.
Sherwell *v.* Combined Incandescent Mantles Syndicate (1907), 31.
Shiell *v.* Guthrie's trs. (1874), 443.
Shiells *v.* Ferguson, Davidson & Co. (1876), 161.
Shiell's trs. *v.* Scottish Property Investment Bldg. Soc. (1884), 127.
Shipton and Harrison's Arbitration, *in re* (1915), 459.
Shore *v.* Wilson (1842), 475, 476.
Shropshire Union, etc. Canal Co. *v.* The Queen (1874), 77, 78, 80.
Shuttleworth *v.* Cox Bros. & Co. (Maidenhead), Ltd. (1926), 90.
Sibbald (1869), 366.
Sidebottom *v.* Kershaw, Leese & Co. (1920), 90.
Sidney (1871), 58.
Sidney *v.* North-Eastern Rly. Co. (1914), 287.
Siemens Bros. & Co. *v.* Burns (1918), 110, 111.
Silkstone Fall Colliery Co., *in re* (1876), 112.
Sillitoe, *ex parte* (1824), 165.
Sim *v.* Lundy & Blanshard (1868), 160.
Simcock *v.* Scottish Imperial Insce. Co. (1901), 346.
Simm *v.* Anglo-American Telegraph Co. (1878), 78.
Simmons *v.* London Joint Stock Bank (1891), 145.
Simpson (1877), 366.
Simpson *v.* Anderson (1684), 403.
    v. Boson Oil Co. (1889), 65.
    v. Westminster Palace Hotel Co. (1860), 125, 126.
Sims *v.* Marryat (1851), 493.
Sinclair *v.* Anderson (1771), 394.
    v. Brougham (1914), 142.
    v. City of Glasgow Bank (1879), 85.
    v. Glasgow and London Contract Corpn. (1904), 140.
    v. Sinclair (1733), 235 ; (1770), 404.
    v. Staples (1860), 72.
Sivright *v.* Dallas (1824), 395.
Skeen (1637), 443.
Skerratt *v.* North Staffordshire Rly. Co. (1848), 274.
Skinner *v.* City of London Marine Insce. Corpn. (1885), 62, 80, 82.
Skipworth (1873), 431, 433.
Slade *v.* Tucker (1880), 352.
Sleigh *v.* Glasgow and Transvaal Options (1904), 31, 54, 65.
Slingsby *v.* Bradford Patent Truck, etc. Co. (1906), 474.
Slipper *v.* Tottenham, etc. Rly. Co. (1867), 307.
Smart *v.* Smart (1926), 364.
Smeaton *v.* St. Andrews Police Commrs. (1868), 446.
Smedley *v.* Registrar of Companies (1919), 108.
Smith *v.* Anderson (1880), 3, 12.
    v. Ayrshire County Council (1907), 574.
    v. Boyle and Gray (1752), 410.
    v. Brown (1896), 74.
    v. Chadwick (1882–4), 49, 53, 55.
    v. Chatto (1874), 500.
    v. East India Co. (1841), 356.
    v. Fell (1841), 349.
    v. Frier (1857), 244.
    v. Glasgow and South-Western Rly. Co. (1897), 125, 139.
    v. Great Western Rly. Co. (1877), 290, 293.
    v. Harrison & Co.'s trs. (1893), 157.
    v. Hughes (1871), 442.
    v. Kippen (1860), 415.
    v. Lanarkshire and Ayrshire Rly. Co. (1905), 278.
    v. Mitchell (1835), 431.
    v. Ogilvie (1821), 252.
    v. Reekie (1920), 445.
    v. Ritchie & Co. (1892), 431.
    v. Smith (1868), 310.
    v. Wallace (1869), 226.
    v. Young's trs. (1789), 390.
Smith (J. M.), Ltd. *v.* Colquhoun's tr. (1901), 449, 450.
Smith's trs. *v.* Grant (1862), 384, 385.
    v. Grant (1897), 334.
    v. Irvine and Fullarton Property Investment, etc. Soc. (1903), 9, 12.
    v. Smith (1911), 445.
Smyth *v.* Darley (1849), 109.
    v. Muir (1891), 139.
Snell *v.* White (1872), 397.
Société Générale de Paris *v.* Walker (1885), 62, 78, 80, 81.
Société Industrielle des Lectain *v.* Huelva (1889), 8.
"Solway," the (1885), 345.
Solway, etc. Rly. Co. *v.* Jackson (1874), 280.
Somervell *v.* Somervell (1900), 358.
South African Territories *v.* Wallington (1898), 147.

Southall *v.* British Mutual Life Assoc. Soc. (1871), 11, 24.
Southampton County Council and Bournemouth Borough Council, *in re* (1922), 561.
South-Eastern Rly. Co. *v.* London County Council (1915), 288.
South Llanharran Colliery Co., *in re* (1879), 122.
South London Fish Market Co., *in re* (1888), 80.
South of England Natural Gas, etc. Co. (1911), 31, 53.
South Staffordshire Waterworks Co. *v.* Mason & Sons (1886), 291.
Southern Bowling Club *v.* Edinburgh "Evening News" (1901), 140.
Southern Brazilian Rio Grande do Sul Rly. Co., *in re* (1905), 26, 127, 145.
Southey *v.* Sherwood (1817), 475.
Southwark Water Co. *v.* Quick (1878), 347.
Spackman *v.* Evans (1868), 69, 86, 95, 116.
Spalding *v.* Spalding's trs. (1874), 334.
Spanish Prospecting Co., *in re* (1911), 121, 123.
Spargo's *case* (1873), 73.
Spencer *v.* Ashworth, Partington & Co. (1925), 80.
  v. Kennedy (1926), 92.
  v. Metropolitan Board of Works (1882), 268.
Spiers *v.* Brown (1858), 501.
Spiller *v.* Mayo (Rhodesia) Development Co. (1908), Ltd. (1926), 111.
Spiral Globe Co., *in re* (1902), 150.
Sprot *v.* Caledonian Rly. Co. (1856), 291.
Stackemann *v.* Paton (1906), 486.
Stair, Countess of (1882), 301.
Stair Estates *v.* Board of Agriculture (1926), 321.
Standard Property Investment Co. *v.* Dunblane Hydro Co. (1884), 146, 546.
Standish *v.* Liverpool Corpn. (1852), 304.
Staples *v.* Eastman Photographic Materials Co. (1896), 123.
Stapley *v.* Read Bros. (1924), 120, 122.
Star Fire and Burglary Insce. Co. *v.* Davidson & Sons (1902), 140.
Stark *v.* Dumbartonshire Commrs. (1885), 556.
  v. Fife and Kinross Coal Co. (1899), 122.
Stark's trs. *v.* Duncan (1906), 435, 438.
State of Wyoming Syndicate, *in re* (1901), 105.
Steedman *v.* City of Glasgow Bank (1879), 63, 66.
Steele *v.* Midland Rly. Co. (1866), 270; (1869), 306.
  v. Steele (1843), 349.
  v. Young (1823), 393.
Stein *v.* Marshall (1802), 344.
Stenhouse *v.* City of Glasgow Bank (1879), 66, 85.
Stephenson, Blake & Co. *v.* Grant, Legros & Co. (1917), 485.
Steven *v.* Dundas (1727), 357.
Stevenson *v.* North British Rly. Co. (1901), 269, 280.
Stevenson *v.* Steel Co. of Scotland, Ltd. (1896), 454.
  v. Wilson (1907), 80, 81.
Stevenson's trs. (1878), 301.
Stewart (1866), 55; (1875), 297, 301; (1877), 366.
Stewart *v.* Bisset (1770), 154.
  v. Burnside (1794), 178.
  v. Earl of Fife (1827), 218.
  v. Fraser (1830), 355, 356.
  v. Highland Rly. Co. (1889), 310.
  v. Keiller & Sons (1902), 83.
  v. Kennedy (1890), 147, 448, 456.
  v. Kerr (1890), 367.
  v. M'Call (1869), 443.
  v. Porterfield (1831), 221.
  v. Scottish North-Eastern Rly. Co. (1859), 299.
  v. Scoto-American Sugar Syndicate, Ltd. liqr. (1901), 70.
  v. Stewart (1803), 221; (1836), 255.
Stewart Precision Carburettor Co., Ltd. (1912), 37.
Stewart's trs. *v.* Evans (1871), 69.
Stirling County Council Western District Cte. *v.* North British Rly. Co. (1896), 305.
Stirling Maltmen (1912), 547.
Stirling Stuart *v.* Caledonian Rly. Co. (1893), 300.
Stobie *v.* Smith (1921), 212.
Stockdale *v.* Onwhyn (1826), 475.
Stocken's *case* (1868), 70, 87.
Stocker *v.* Cousstonholm Paper Mills, Ltd. liqrs. (1891), 66.
Stone *v.* City and County Bank (1877), 54.
  v. Yeovil Corpn. (1876), 266, 289.
Stott *v.* City of Glasgow Bank (1879), 85.
  v. Fender and Crombie (1878), 253.
Strabane Urban District Cte., *ex parte* (1910), 281.
Strain *v.* Strain (1890), 162.
Strathallan *v.* Drummond (1828), 388.
Strauss *v.* Francis (1886), 257.
Streatham and General Estates Co., *in re* (1897), 143.
Stretton *v.* Great Western, etc. Rly. Co. (1870), 270, 272, 308.
Stringer's *case* (1869), 100, 101, 120, 122.
Stroyan *v.* M'Whirter (1901), 358.
Struthers *v.* Lang (1826), 246.
Stuart *v.* Great North of Scotland Rly. Co. (1896), 346.
  v. Miller (1836), 349.
  v. Stuart (1869), 163.
Stuart's exrs. *v.* Stuart (1709), 154.
Stuart's Trusts, *in re* (1876), 122.
Stuart-Gordon *v.* Stuart-Gordon (1899), 332.

Stubbs *v.* Holywell Rly. Co. (1867), 459.
Studd *v.* Cook (1883), 225, 236.
Sturrock *v.* Binny (1843), 338.
    v. Greig (1849), 356, 359.
Sullivan *v.* Mitcalfe (1880), 51, 56.
Summerlee, etc. Steel Co. *v.* Caledonian Rly. Co. (1909), 460.
Surgeons, England College, *in re* (1893), 538.
Surrey County Cricket Club, *in re* (1901), 537.
Sutherland *v.* Ritchie (John), & Co., Ltd. (1900), 345.
Swabey *v.* Port Darwin Gold Mining Co. (1889), 94.
Swan Brewery Co. *v.* The King (1914), 124.
Swans *v.* Western Bank (1866), 179.
Swedish Match Co. *v.* Seivright (1889), 29, 60.
Sweet *v.* Benning (1855), 472.
Swinfen *v.* Chelmsford (1860), 257.
    v. Swinfen (1856), 257.
Sydney Municipal Corpn. *v.* Campbell (1925), 268.
Sykes' *case* (1871), 94.
Szillassy (1886), 373.

TAIT *v.* Macleay (1904), 57.
"Talisman," the, *v.* the "Tyne" (1896), 345.
Tambracherry Estates Co., *in re* (1885), 44.
Tamplin S.S. Co. *v.* Anglo-Mexican Petroleum Co. (1916), 460.
Tannet, Walker & Co. *v.* Hannay & Sons (1873), 344, 345.
Tate *v.* Fullbrook (1908), 480.
    v. Thomas (1921), 480, 486.
Taylor *v.* Caldwell (1863), 459.
    v. Foster (1826), 348.
    v. Neville (1878), 495.
    v. Provan (1864), 448.
    v. Tweedie (1922), 365.
Taylor's exrs. *v.* Taylor (1918), 368.
Taylor's tr. *v.* Paul (1888), 157.
Taylor *v.* Oldham Corpn. (1876), 290.
    v. Union Heritable Securities Co., Ltd. (1889), 70, 87, 88.
Taylor and Skinner *v.* Bayne and Wilsons (1776), 473.
Taurine Co., *in re* (1883), 110.
Tayside Floorcloth Co. (1923), 129.
Temple *v.* Halliday (1706), 389.
Tennent *v.* City of Glasgow Bank (1879), 54, 55, 66, 259.
Tewkesbury Gas Co., *in re* (1911), 149.
Texas Land and Cattle Co. (1894), 36, 44.
Texas Land and Cattle Co. *v.* Inland Revenue (1888), 148.
Thames Tunnel, etc. Act, *in re* (1908), 303.
Tharsis Sulphur and Copper Co. (1914), 132.
Tharsis Sulphur and Copper Co. *v.* Hoggan (1882), 44, 46.
Thew & Co. *v.* Sinclair & Co. (1881), 250.
Thicknesse *v.* Lancaster Canal Co. (1838), 284.
Thom *v.* North British Banking Co. (1850), 164.
Thom *v.* Thom (1852), 395.
Thomas *v.* City of Glasgow Bank (1879), 63.
    v. Turner (1886), 472.
    v. United Butter Companies of France (1909), 10.
Thoms *v.* Bain (1888), 257.
Thomson (1900), 366.
Thomson *v.* Edinburgh Candlemakers (1855), 545, 547.
    v. Fraser (1868), 256.
    v. James (1855), 450.
    v. Kilgour (1628), 178.
    v. North British Rly. Co. (1867), 242, 299, 300, 302.
    v. Stephenson (1855), 153, 162, 164.
    v. Thomson (1907), 346.
Thomson's trs. *v.* Clark (1823), 348.
    v. Robb (1851), 337.
Thomson & Co. *v.* Pattison, Elder & Co. (1896), 97.
Thomson & Craig *v.* Latta (1863), 253.
Thomsons *v.* Lawsons (1681), 395.
Thorn *v.* London Mayor, etc. (1876), 451.
Thurrock, etc. Sewerage Board *v.* Thames Land Co. (1925), 290, 313.
Tierney *v.* Ballingall & Son (1896), 357.
Tiessen *v.* Henderson (1899), 112.
Tillicoultry crs. *v.* Murray (1701), 178.
Tinnevelly Sugar Refining Co. *v.* Mirrlees, Watson & Yaryan Co. (1894), 134, 139.
Tinsley *v.* Lacy (1863), 481, 501.
Titchfield *v.* Glasgow and South-Western Rly. Co. (1853), 300.
Tiverton, etc. Rly. Co. *v.* Loosemore (1884), 268, 305.
Tochetti *v.* City of Glasgow Bank (1879), 85.
Tod (1890), 364.
Tod's tr. *v.* Officer (1872), 351.
Todd *v.* Clyde trs. (1843), 283.
    v. Metropolitan District Rly. Co. (1871), 277.
Tolhurst *v.* Associated Portland Cement Manufacturers (1900), (1903), 135, 456.
Tolmie *v.* Urray Parochial Board (1890), 567.
Toms *v.* Cinema Trust (1915), 102.
Tonson *v.* Walker (1752), 501.
Torbat *v.* Torbat's tr. (1906), 256.
Torbock *v.* L. Westbury (1902), 113.
Torphichen *v.* Caledonian Rly. Co. (1851), 300.
Towers *v.* African Tug Co. (1904), 125.
Traill *v.* Dewar (1881), 448.
Transvaal Lands Co. *v.* New Belgium, etc. Co. (1914), 100.
Tree *v.* Bowkett (1895), 493, 495.
Trevor *v.* Whitworth (1887), 38, 39, 42, 74, 86, 88, 119, 125, 127, 141.
Trigge *v.* Lavallée (1863), 255.
Trotter *v.* British Linen Bank (1898), 84.
Truman's Claim (1894), 60.

Truman, Hanbury, Buxton & Co., Ltd. (1910), 45.
Trust and Agency Co. of Australasia, *in re* (1908), 28, 128.
Tuffnell's *case* (1885), 58, 63.
Tulloch *v.* Davidson (1858), 55, 99.
Tullochs *v.* Welsh (1838), 339, 342.
Turnbull *v.* Allan & Son (1833), 85.
v. M'Lean & Co. (1874), 457.
v. Scottish Central Rly. Co. (1848), 269.
v. Turnbull's trs. (1822), 397.
v. West Riding Athletic Club (Leeds), (1894), 100.
Turner *v.* Robinson (1860), 471.
Turquand *v.* Marshall (1868), 98.
Tussaud *v.* Tussaud (1890), 27.
Tweedie (1829), 429.
Twycross *v.* Grant (1877), 56, 57.

Union Bank, *Petrs.* (1897), 274.
Union Bank of Scotland (1918), 129, 132.
Union Bank of Scotland *v.* Daily Record (Glasgow), Ltd. (1902), 390.
v. National Bank of Scotland (1886), 71, 79.
Union Club, Ltd. liqr. *v.* Edinburgh Life Assce. Co. (1906), 74.
Union Plate Glass Co. (1889), 45.
United States *v.* Motor Trucks, Ltd. (1924), 256.
United Wire Works Co. *v.* Caledonian Rly. Co. (1906), 286, 287.
Universal Corpn. Ltd. *v.* Hughes (1909), 68.
v. Simson (1908), 102.
Urie's trs. *v.* Urie (1896), 398.
Usher *v.* Edinburgh Mags. (1839), 435.

Valentine *v.* Grangemouth Coal Co. (1897), 72.
Valpy *v.* Gibson (1847), 449.
Veitch *v.* Robertson (1630), 397.
Venables *v.* Baring Bros. & Co. (1892), 145.
Venezuela Central Rly. *v.* Kisch (1867), 26.
Verner *v.* General and Commercial Investment Trust (1894), 41, 119, 120, 121.
Viani & Co. *v.* Gunn & Co. (1904), 452.
Victoria (Malaya) Rubber Estates, Ltd., *in re* (1914), 42.
Victors, Ltd. *v.* Lingards (1927), 96.
Vine and General Rubber Trust, *in re* (1913), 35, 37.
"Vitruvia," the (1924), 442.

Waddell *v.* Campbell (1898), 457.
Waddell's trs. *v.* Waddell (1896), 340.
Wainwright *v.* Ramsden (1839), 307.
Walker *v.* Flint (1863), 443, 451.
v. Grieve (1827), 409, 410.
v. Junor (1903), 438.
v. London Tramways Co. (1879), 89.
v. Royal Infirmary Managers (1872), 545.
Walker *v.* Walker (1896), 354.
v. Walker's trs. (1917), 400.
v. Wishart (1825), 438.
v. Zetland Commrs. (1870), 556.
Walker (John) & Sons (1914), 129.
Walker Steam Trawl Fishing Co. (1908), 41.
Walker's trs. *v.* Caledonian Rly. Co. (1881), 288.
Wall *v.* Exchange Investment Corpn. (1926), 111.
v. London and Northern Assets Corpn. (1898), 113.
v. London and Provincial Trust (1920), 121, 122.
v. Taylor (1883), 504.
Wallace *v.* Crawford's exrs. (1838), 177.
v. Earl of Eglinton (1835), 177.
v. Gibson (1895), 444.
v. St. Andrews University (1904), 170.
v. Wallaces (1807), 337.
Wallis's *case* (1868), 60.
Walter *v.* Lane (1900), 471, 472, 477.
v. Steinkopff (1892), 477, 500.
Walton Bros. *v.* Glasgow Mags. (1876), 391.
Wamphray's crs. *v.* Lord Wamphray (1675), 350.
Wandsworth and Putney Gas, etc. Co. *v.* Wright (1870), 92.
Ward, Lock & Co. *v.* Long (1906), 494.
Ware *v.* Anglo-Italian Commercial Agency, Ltd. (No. 2) (1923), 485.
v. Whitlock (1923), 260.
Wark *v.* Bargaddie Coal Co. (1859), 352, 446.
Warne *v.* Routledge (1874), 495.
v. Seebohm (1888), 498, 507, 481.
Warr & Co. *v.* London County Council (1904), 280.
Washington Diamond River Co., *in re* (1893), 94.
Waterhouse *v.* Jamieson (1870), 60.
Waterlow Bros. *v.* Layton (1909), 78.
Waters *v.* Hagger & Co. (1923), 483.
Watherstone *v.* Rentons (1801), 394.
Watkins *v.* Great Northern Rly. Co. (1851), 287.
Watson *v.* Cunningham (1675), 155.
v. Murray (1820), 431.
Watson (John), Ltd. (1895), 44.
Watt *v.* Jervie (1760), 331, 333.
v. Kempt (1865), 66.
v. Ligertwood (1874), 429.
v. Thomson (1870), 429.
Watts *v.* Bucknall (1903), 51, 56, 57.
Wauchope (1882), 336.
Waverley Hydropathic Co. *v.* Barrowman (1895), 29, 60, 77.
Weatherby *v.* International Horse Agency (1910), 473.
Webb *v.* Earle (1875), 123.
v. Smith (1824), 352.
Webb, Hale & Co. *v.* Alexandrina Water Co. (1905), 79.

Webster *v.* Ayr Tailors (1893), 545.
v. Shiress (1878), 368.
Wedderburn *v.* North British Rly. Co. (1871), 303.
Weir *v.* Bell (1878), 55.
Weld *v.* London and South-Western Rly. Co. (1862), 267.
Wells *v.* Chelmsford Local Board of Health (1880), 299.
Welsbach Incandescent Gas Light Co., *in re* (1904), 19, 42, 71.
Welsbach Incandescent Gas Light Co. *v.* M'Mann (1901), 436, 437.
Welsh *v.* Barstow (1837), 388.
v. Stewart (1818), 437.
Welsh Flannel and Tweed Co. (1875), 69.
Welsh & Forbes *v.* Johnston (1906), 107.
Welton *v.* Saffery (1897), 25, 26, 70, 77.
Wemyss Collieries Trust *v.* Melville (1905), 122, 123.
Wenlock, Baroness, *v.* River Dee Co. (1885–7), 67, 125, 141, 448.
Wentworth *v.* Lloyd (1864), 349.
West Cumberland Iron and Steel Co., *in re* (1893), 144.
West Hartlepool Corpn. *v.* Durham County Council (1907), 561.
West Highland Rly. Co. *v.* Place (1894), 306.
West India and Pacific S.S. Co., *in re* (1868), 35, 89.
West Yorkshire Darracq Agency, *in re* (1908), 75.
West Yorkshire Darracq Agency, Ltd. *v.* Coleridge (1911), 95.
Western Bank of Scotland *v.* Addie (1867), 449.
v. Baird's trs. (1866), 99 ; (1872), 92.
v. Douglas (1860), 99.
Western Counties Steam Bakeries, etc. Co. (1897), 116.
Western Ranches *v.* Nelson's trs. (1899), 128, 130, 132.
Westfield and Metropolitan Rly. Cos., *in re*, Reg. *v.* Smith (1883), 277.
Weston's *case* (1870), 80.
Westwood *v.* Cassells (1907), 444.
Whaley Bridge Printing Co. *v.* Green (1879), 12.
Wheal Buller Consols, *in re* (1888), 93.
Wheeler *v.* Le Marchant (1881), 351, 353.
White (1879), 73.
White *v.* Anderson (1904), 237.
v. Briggs (1890), 473.
v. Dickson (1881), 469.
Whitechurch (George), Ltd. *v.* Cavanagh (1902), 62, 78, 105.
Whitehall Court Co., *re* (1887), 94.
Whitehill *v.* Glasgow Corpn. (1915), 346, 347.
Whitehouse *v.* Wolverhampton Rly. Co. (1869), 293.
Whiteley (Wm.), Ltd. *v.* Dobson, Molle & Co. (1902), 347.
Whitley Partners, *in re* (1886), 17, 61.
Whittingham *v.* Wooler (1817), 500.
Wight *v.* Ewing (1828), 348.
Wilkie *v.* Jackson (1836), 337, 341.
Wilkinson Sword Co., *in re* (1913), 76.
Williams' tr. *v.* Inglis, Borthwick, Gilchrist & Co. (1809), 164.
Williams (1869), 83.
Williams *v.* Permanent Trustee Co. of New South Wales (1906), 10.
v. Star Newspaper Co. (1908), 359.
Williamson *v.* Cochrane and Paterson (1826), 395.
Williamson's trs. (1903), 298.
Willis *v.* Curtois (1838), 492.
Willoughby *v.* Willoughby (1847), 273.
Willoughby de Eresby, Lady, *v.* Callander and Oban Rly. Co. (1885), 300.
Wills *v.* Murray (1850), 109.
Wilmer *v.* M'Namara & Co. (1895), 120.
Wilson (1900), 365 ; (1921), 429.
Wilson *v.* Dunlop, Bremner & Co., Ltd. (1921), 97.
v. Gibson (1840), 398.
v. Glen (1819), 393, 395, 397.
v. Guthrie, Smith and ors. (1894), 101, 148.
v. Northampton and Banbury Jn. Rly. Co. (1874), 456.
v. Pollok (1839), 410.
v. Rastall (1792), 351, 352.
Wilson's exrs. *v.* Bank of England (1925), 358.
Wimbledon Olympia Ltd. (1910), 53.
Winder, *ex parte* (1877), 442.
Windsor, Staines, and Great Western Rly. Act, *in re* (1850), 300.
Wingate & Co. *v.* Inland Revenue (1897), 8.
Winn *v.* Bull (1877), 445, 446.
Wishart *v.* City of Glasgow Bank (1879), 85.
v. Grant (1763), 338.
Wishart & Dalziel *v.* City of Glasgow Bank (1879), 72.
Wolf (Thomas) & Son (1907), (1912), 42.
Wolff *v.* Wood (1903), 497.
Wood *v.* Abrey (1818), 451.
v. Barker (1865), 253.
v. Boosey (1868), 481, 502.
v. Charing Cross Rly. Co. (1863), 304.
v. Odessa Waterworks Co. (1889), 123.
Wood Green Gospel Charity, *in re* (1909), 300.
Wood's Estate, *in re* (1886), 264.
Wood's Ship's Woodite Protection Co. (1890), 94.
Woodhouse & Rawson *v.* Hosack (1894), 77.
Woods, Parker & Co. *v.* Ainslie (1860), 250.
Wordie *v.* Sampson (1750), 394.
Worth, *ex parte* (1859), 53.
Wotherspoon *v.* Linlithgow Mags. (1863), 546.
Wragg, Ltd., *in re* (1897), 74.
Wrexham, etc. Rly. Co., *in re* (1899), 142.

Wright *v.* Arthur (1831), 352.
  v. Dunlop & Co. (1893), 104, 134.
  v. Greig, Ltd. (1910), 259.
  v. Horton (1887), 150.
  v. Sheill (1676), 166.
  v. Smith (1716), 387.
  v. Tallis (1845), 474.
Writers to the Signet Soc. *v.* Inland Revenue (1886), 536, 538.
Wyatt *v.* Barnard (1814), 473.
  v. Gore (1916), 356.

YATES *v.* Blackburn Corpn. (1860), 273, 275.
York Corpn. *v.* Leetham & Sons (1924), 257.
York Tramways Co. *v.* Willows (1882), 91, 102.
Yorkshire County Council *v.* Middlesbrough County Borough Council (1914), 561.
Yorkshire Fibre Co. (1870), 115.
Young *v.* Armour (1921), 432.
  v. Brownlee & Co., Ltd. (1911), 139.
  v. Gordon's trs. (1847), 169, 174.
  v. Ladies' Imperial Club (1920), 102, 109.
Young *v.* Naval, etc. Co-operative Soc. of South Africa (1905), 94.
  v. North British Rly. Co. (1888), 308.
  v. Robertson (1862), 342.
  v. Thomson (1909), 445.
  v. Watson (1835), 395.
Young's Paraffin Light, etc. Oil Co. (1894), 130.
Young & Co. *v.* Excise Commrs. (1816), 356.
Young (James) & Sons, Ltd. *v.* Gowans (1902), 134, 139.
Young and Chalmers *v.* Young and Macky (1696), 404.
Ystalyfera Iron Co. *v.* Neath, etc. Rly. Co. (1873), 267.
Yuill *v.* Greymouth Point Elizabeth Rly. and Coal Co. (1904), 102.
Yule *v.* Yule (1758), 331.

ZELMA GOLD MINING Co. *v.* Hoskins (1895), 138, 139.
Zetland, Earl of, *v.* Glover Incorporation of Perth (1870), 411.
Zuccani *v.* Nacupai Gold Mining Co. (1888), 72.
Zuille *v.* Morrison (1813), 410.

COMPANY.

TABLE OF CONTENTS.

Part I.—Introductory.

- Definition 3
- Classification 3
  - Common-Law Companies . . 3
  - Chartered Companies . . . 3
  - Companies under the Companies Clauses Acts 5
  - Companies Registered under the Companies Acts . . . 6
- Domicile 7
- Jurisdiction 8

Part II.—Companies under the Companies Acts, 1908 to 1917.

- In General 9
  - Repeal of Former Acts, and Savings from Repeal 9
  - Interpretation 10
  - Application of Act of 1908 to Existing Companies without Re-registration 10
  - Companies which may Register under the Act of 1908 although not Formed thereunder . . 10
  - Companies which must be Registered under the Act of 1908 . 11
- Promotion of Companies . . . 12
  - Meaning of the Term "Promoter" 12
  - Fiduciary Relation of Promoters to the Company . . . 13
  - Disclosure Necessary to Avoid Liability 13
  - Remedy against Promoter for Illegal Profits 14
  - Payment by Company of Promoter's Expenses 15
  - Promoters' Liability to Each Other 15
- Formation and Registration . . 15
  - In General 15
    - Registration Office 15
    - Fees 15
    - Registration under Part VII. of the Act 16
    - Registration of Unlimited Company as Limited, and Re-registration of Limited Company 16
- Formation and Registration (*contd.*)—
  - Company Limited by Shares . 17
    - Memorandum and Articles of Association 17
    - Public Company . . . 19
    - Private Company . . . 19
  - Company Limited by Guarantee . 22
  - Limited Company Registered without the Word Limited . . 23
  - Unlimited Company . . . 24
- Effect of Memorandum and Articles . 25
- Registered Office 27
- Name and Change of Name . . 27
- Capital 29
  - In General 29
  - Underwriting and Brokerage . 30
  - Increase of Capital . . . 32
  - Consolidation and Division of Capital 34
  - Subdivision of Shares . . . 34
  - Conversion of Shares into Stock, and Reconversion . . . 35
  - Cancellation of Unissued Shares . 36
  - Reorganisation of Capital . . 36
  - Reduction of Capital . . . 37
    - In General 37
    - Without Confirmation by the Court 38
      - Return of Accumulated Profits 38
      - Forfeiture and Surrender of Shares 39
      - Unlimited Company . . 39
    - With Confirmation by Court . 39
      - In General 39
      - Applications to Court . . 43
        - Where Creditors are not Concerned 44
        - Where Creditors are Concerned 45
      - The Order Confirming Reduction 47
  - Application of Capital . . . 47
- Prospectus 48
  - Definition 48
  - Filing 48
  - Contents 48
  - Misrepresentation and Non-disclosure in Prospectus . . 52
    - General 52

TABLE OF CONTENTS (*continued*).

PAGE

- Prospectus (*contd.*)—
  - Misrepresentation and Non-disclosure in Prospectus (*contd.*)—
    - Action for Rescission . . . 52
    - Rectification of the Register and Consequent Relief . . . 54
    - Action of Damages . . . 55
  - Statement in Lieu of Prospectus . 57
- Membership 58
  - In General 58
  - Contract for Membership . . 59
  - Register of Members 61
    - Contents 61
    - Evidence of Matters Recorded . 63
    - Custody and Inspection . . 64
    - Rectification 64
    - Colonial Registration . . 66
  - Rights and Liabilities of Members . 67
    - In General 67
    - Calls 68
    - Lien on Shares 70
    - Alteration of Member's Position and Termination of Membership 71
- Shares 72
  - In General 72
  - Allotment and Issue 75
    - Allotment 75
    - Return of Allotments and Filing Contracts 76
    - Issue 76
  - Certificates of Shares . . . 77
  - Share Warrants to Bearer . . 79
  - Transfer, Transmission, and Mortgage of Shares 80
    - Contract to sell Shares . . 80
    - Transfer 81
    - Transmission of Shares . . 84
    - Mortgages 85
  - Forfeiture of Shares 86
  - Surrender of Shares 87
- Regulation and Management . . 88
  - In General 88
    - Under Table A 88
    - Under Special Articles . . 89
    - Alteration of Articles . . 89
  - Directors 90
    - Appointment 90
    - Qualification 92
    - Remuneration 93
    - Powers and Duties 95
    - Liabilities 97
    - Meetings of Directors . . 102
    - Retirement, Resignation, and Removal 103
  - Secretary and other Officers . . 104
    - In General 104
    - Secretary 105
- Regulation and Management (*contd.*)—
  - Secretary and other Officers (*contd.*)—
    - Managers 106
    - Solicitor 107
    - Auditors 107
  - Meetings of Members . . . 107
    - General Meetings . . . 107
    - How Meetings are Convened . 108
    - Proceedings at Meetings . . 109
    - Resolutions at Meetings . . 111
    - Evidence as to Meetings . . 113
  - Commencement of Business . . 114
  - Returns to Registrar . . . 114
  - Accounts and Audit . . . 115
    - Accounts 115
    - Audit of Accounts and Auditors 116
    - Inspectors 118
  - Dividends and Profits . . . 119
- Powers and Liabilities of a Company . 124
  - Powers of a Company . . . 124
  - Alteration of Objects . . . 128
    - Principles 128
    - Procedure 130
  - Exercise of a Company's Powers . 133
    - Agency 133
      - Employment of Agents by a Company 133
      - Liability of a Company for the Acts of its Agents . . 133
    - Contracts 134
      - Contracts before Incorporation or Commencement of Business 134
      - Form of Contracts—Authentication of Documents . . 135
      - Contracts of Companies in General 136
      - Bills and Notes . . . 137
    - Notices to and by a Company . 138
    - Arrangements and Compromises . 138
  - Liability of a Company for Crimes and Offences . . . 138
  - Power to Sue and Defend . . 138
- Ownership and Disposition of Property 140
- Borrowing 141
  - Power to Borrow 141
  - Power to Grant Security for Money Borrowed 143
  - Debentures and Debenture Stock . 145
    - Form and Contents of Instruments of Security . . . 145
      - Debentures 145
      - Debenture Stock . . . 147
      - Debenture Trust Deeds . . 148
    - Stamp Duty 148
    - Debenture Prospectus . . 149
  - Registration of Mortgages and Charges 149

PART I.—INTRODUCTORY.

SECTION 1.—DEFINITION.

1. A company is an association of persons formed for the purpose of carrying on some business or undertaking in name of the association, each member having the right, subject to the regulations governing the administration of the association, to transfer his interest therein to any other person. It is thus distinguished from a partnership by the fact that it is a combination in which the partners may change from time to time without the necessity either of consent between the partners or of novation as regards the creditors.[1] A company is a legal person, different from the individuals who compose its membership, and its identity is not affected by changes in the membership.

SECTION 2.—CLASSIFICATION.

SUBSECTION (1).—*Common-Law Companies.*

2. Joint-stock companies were recognised in Scotland prior to the Companies Acts. The Bubble Act of 1719,[2] which declared such companies illegal and public nuisances, and their promoters punishable by the criminal law, was never enforced in Scotland, though it was pleaded in one case in 1730.[3] The leading features of a joint-stock company—viz. the separate *persona* of the company, the right to sue and be sued in the company's name with the names of some of the directors added,[4] the transferability of the stock,[5] and the management of the company's affairs by directors and officials, not by the shareholders—were not opposed to the common law of Scotland. As in the case of partnerships proper, debts must first be constituted against the company before any shareholder can be called on to pay; and the liability of members is unlimited, notwithstanding the decision in *Stevenson* v. *M'Nair*,[6] which was never followed. Such companies cannot hold land in the corporate name. It must be held in the name of trustees for the company. A common-law corporation is cited by its corporate name, or by citing its members as such.[7]

SUBSECTION (2).—*Chartered Companies.*

3. These are proper corporations created by royal charter granted by the Crown in the exercise of its prerogative, or by special Act of Parliament. Their characteristics or *naturalia* are: a separate *persona*;

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[1] See *Smith* v. *Anderson*, 1880, 15 Ch. D. 247, per James L.J. at p. 273. See Buckley on the Companies Acts, 10th ed., p. 2 *et seq.*

[2] 6 Geo. I. c. 18.

[3] *Masons of Lanark* v. *Hamilton*, 1730, Mor. 14554.

[4] *Sea Insurance Co. of Scotland* v. *Gavin*, 1827, 5 S. 348.

[5] See Lord Curriehill in *Drew* v. *Lumsden*, 1865, 3 M. 384, at p. 392, and Lord Pres. Inglis in *Muir* v. *City of Glasgow Bank*, 1878, 6 R. 392, at p. 399; 1879, 6 R. (H.L.) 21.

[6] 1757, Kames, Select Dec., p. 191.

[7] *Eadie* v. *Corporation of Glasgow*, 1908 S.C. 207.

a corporate name under which they are entitled to act and contract, to sue and be sued, and to hold land and other property; perpetual succession; a common seal; power to act by a majority and to make bylaws; and the privilege of limited liability. In regard to the last point, it has been said that "the corporation, being a separate person, has its own estate and its own liabilities, and the corporators are not liable for the corporation, but only to the corporation within the limit of the obligation they have undertaken to subscribe to the corporate funds. *Si quid universitati debetur, singulis non debetur; nec quod universitas debet, singuli debent.*"[1] Indeed, it is said that the Crown cannot, at common law, create a corporation with unlimited liability on the part of its members.[2] At any rate, it was assumed, in 1826, that the Crown would not do so without statutory authority,[3] and accordingly it was enacted[4] that, in any future royal charter for the incorporation of any company, it should be lawful to provide that the members should be individually liable for the debts of the corporation, to such extent and subject to such restrictions as the Crown should deem proper and should declare in the charter. This was repealed but in substance re-enacted by the Chartered Companies Act, 1837,[5] "letters patent" being substituted for "charter."

4. The Royal Bank of Scotland, in 1727, and the British Linen Company Bank, in 1819 (though its original letters patent were granted in 1746), were incorporated by royal charter at common law, and with the Bank of Scotland, which was incorporated by a special Act of the Scots Parliament in 1695, were known both popularly and legally as the "chartered banks."[6] The Commercial Bank of Scotland was established in 1810, and the National Bank of Scotland in 1825, and both obtained in 1831 royal charters under the Act 6 Geo. IV. c. 91, with the liability of the shareholders unlimited. This was done by declaring that nothing contained in the charters should limit the responsibility of the partners under their original constitutions. From this time (1831) it may fairly be said that the meaning of the term "chartered banks" was more comprehensive, and included the two new banks as well as the three old ones;[7] but *per incuriam* Lord Pres. Inglis, in *M'Kinnon, Petr.*,[8] misstates the import of *Sanders'* case, as confining the term to the three old banks. But the term does not include banks registered and incorporated under public statutes, like the Companies Act, 1862.[9] The Scotch banks other than the original "chartered" ones have now registered as "limited" companies with reserve capital under the Companies Act, 1879.

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[1] *Muir* v. *City of Glasgow Bank*, 1878, 6 R. 401, per Lord Pres. Inglis.

[2] *Sanders* v. *Sanders' Trs.*, 1879, 7 R. 157, per Lord Deas at p. 168.

[3] *Ibid.*, per Lord Pres. Inglis at p. 162.

[4] 6 Geo. IV. c. 91, s. 2.

[5] 7 Will. IV. & 1 Vict. c. 73.

[6] Bell, Com. i. 101, 102.

[7] *Sanders* v. *Sanders' Trs.*, 1879, 7 R. 157, per Lord Pres. Inglis at p. 162, and Lord Shand at p. 172.

[8] 1884, 11 R. 676, at p. 680.

[9] *Sanders, supra.*

5. Chartered companies cannot be dissolved at the will of their members, but only by public authority, *e.g.* by surrender duly made to and accepted by the Crown. Their rights may also for due cause be forfeited, the forfeiture being declared by the Court. They may also be extinguished by becoming incapable of fulfilling the purposes of their institution.

6. Royal burghs (which are themselves full corporations) had an express or presumed authority, delegated to them from the Crown, to erect guilds or trade societies into corporations, with the usual corporate rights. The writ or charter was issued under the burgh seal, and was called a "seal of cause." Many of these exist and are fully recognised in Scotland. Lords of regality and barons also exercised similar powers of erecting corporations within their burghs of regality and barony.[1]

SUBSECTION (3).—*Companies under the Companies Clauses Acts.*

7. Companies were also incorporated by special Acts of Parliament for the purpose of carrying out large enterprises of a public nature, such as waterworks, gasworks, railways, harbours, etc. By such special Act the company was incorporated with all the powers and privileges of a complete corporation, and the Act contained in full detail the constitution, regulations, and powers of the company. It also contained the compulsory powers, privileges, and monopolies which Parliament conferred for carrying out the public enterprise. As such Acts came to be more numerous, the system was adopted in 1845 of embodying in general Acts the statutory provisions common to the constitution of all such companies, and to the different enterprises concerned. Thus there were passed in 1845 and subsequent years "Clauses Acts" applicable to companies to be in future incorporated by Act of Parliament for the execution of undertakings of a public nature, the acquisition of lands for public works, and the construction of railways, waterworks, gasworks, harbours, etc. It is provided that these Acts shall apply to companies and undertakings authorised in future, and shall be incorporated with the special Act and construed along with it, except so far as varied or excepted by the special Act. But provision is also made for the incorporation of such portions of the general Acts as are applicable to different subjects. If the special Act does not expressly or by necessary implication exclude it, the general Act is to be taken as incorporated.

8. The Companies Clauses Consolidation Acts applicable to Scotland are the Acts of 1845,[2] 1863,[3] and 1869.[4] They contain a code regulating the constitution and management of such companies as are referred to in the previous paragraph. Their provisions differ in many particulars from those of the Companies Acts, notably in the absence of any winding-up clauses. But such companies (except railway companies) may be wound up under the Companies (Consolidation) Act, 1908 (ss. 267 *et seq.*).[1] Generally, the powers of such companies which go beyond the common law are somewhat jealously scrutinised.[2] As to a railway company, it is, as Lord Cairns expresses it,[3] "a going concern with internal and parliamentary powers of management not to be interfered with; a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under the contract pledging it as security, be destroyed, broken up, or annihilated." The rights and remedies of creditors of companies under the Companies Clauses Acts and the Companies Acts differ in various respects. See PUBLIC COMPANY.

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[1] See further on this subject, and on the difference between the law of corporations in Scotland and England, *University of Glasgow* v. *Faculty of Physicians and Surgeons of Glasgow*, 1834–1840, 13 S. 9; 2 S. & M‘L. 275; 15 S. 736; and 1 Rob. App. 397.

[2] 8 & 9 Vict. c. 17.

[3] 26 & 27 Vict. c. 118.

[4] 32 & 33 Vict. c. 48.

SUBSECTION (4).—*Companies Registered under the Companies Acts.*

9. Acts of 1825, 1826, 1834, and 1844 gave facilities for the incorporation of companies, and for their suing and being sued. Other Acts were passed in 1844 and 1848 regarding the incorporation and winding up of companies, but these did not apply to Scotland; nor did the Act of 1855,[4] which first introduced limited liability. The first Act dealing with the incorporation, regulation, and winding up of joint-stock companies, limited and unlimited, which included those established in Scotland, was that of 1856,[5] amended in 1857 and 1858. These were repealed by the Companies Act, 1862,[6] which provided (s. 4) that no company or partnership consisting of more than twenty (or in the case of banks, ten) members could be formed after 2nd November 1862, unless registered under the Act. Provision was further made for unregistered companies being wound up by the Court, but not voluntarily or under supervision (ss. 199–204). There are corresponding provisions in the Companies (Consolidation) Act, 1908,[7] passed on 21st December 1908, applicable to companies formed after 1st April 1909 (ss. 1 and 267–273).

10. The Short Titles Act, 1896,[8] provides that the following Acts may be cited as the Companies Acts, 1862–1893, namely:

The Companies Act, 1862, 25 & 26 Vict. c. 89.

The Companies Seals Act, 1864, 27 & 28 Vict. c. 19.

The Companies Act Amendment Act, 1867, 30 & 31 Vict. c. 131.

The Joint Stock Companies Arrangement Act, 1870, 33 & 34 Vict. c. 104.

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[1] *In re Barton Water Co.*, 1889, 42 Ch. D. 585; *In re Borough of Portsmouth Tramways Co.*, [1892] 2 Ch. 362.

[2] *Scottish Drainage Co.* v. *Campbell*, 1889, 16 R. (H.L.) 16.

[3] *Gardner* v. *London, Chatham, and Dover Rly. Co.*, 1867, L.R. 2 Ch. 201, at p. 217.

[4] 18 & 19 Vict. c. 133.

[5] 19 & 20 Vict. c. 47.

[6] 25 & 26 Vict. c. 89.

[7] 8 Edw. VII. c. 69.

[8] 59 & 60 Vict. c. 14.

The Companies Acts Amendment Act, 1877, 40 & 41 Vict. c. 26.

The Companies Act, 1879, 42 & 43 Vict. c. 76.

The Companies Acts Amendment Act, 1880, 43 Vict. c. 19.

The Companies (Colonial Registers) Act, 1883, 46 & 47 Vict. c. 30.

The Companies Act, 1886, 49 & 50 Vict. c. 23.

The Companies (Memorandum of Association) Act, 1890, 53 & 54 Vict. c. 62.

The Companies (Winding-up) Act, 1890, 53 & 54 Vict. c. 63.

The Directors Liability Act, 1890, 53 & 54 Vict. c. 64.

The Companies (Winding-up) Act, 1893, 56 & 57 Vict. c. 58.

To these were added:

The Companies Act, 1898, 61 & 62 Vict. c. 26;

The Companies Act, 1900, 63 & 64 Vict. c. 48; and

The Companies Act, 1907, 7 Edw. VII. c. 50.

[*Note.*—The Winding-up Acts, 1890 and 1893, do not apply to Scotland.]

The Companies (Consolidation) Act, 1908,[1] is intended to form a complete code of company law for the whole United Kingdom. Subsequent Acts are the Companies Act, 1913;[2] the Companies (Foreign Interests) Act, 1917;[3] and the Companies (Particulars as to Directors) Act, 1917.[4] These Acts are cited as the Companies Acts, 1908 to 1917.

SECTION 3.—DOMICILE.

11. The domicile of a corporation is the place considered by law to be the centre of its affairs. In the case of a trading corporation, its principal place of business, *i.e.* the place where the administrative business of the corporation is carried on, and in the case of any other corporation, the place where its functions are discharged, is its domicile.[5] The domicile of a corporation is distinct from that of the persons who compose it.[6] It is a fiction suggested by the fact that a corporation is, on certain points, *e.g.* the jurisdiction of the Courts, subject to the law of a particular country; and consequently it may be domiciled in one country for one purpose, *e.g.* liability to be sued, and not for another,[7] *e.g.* taxation. The facts upon which domicile depends cannot indeed be stated with certainty.[8] The distinction between domicile and residence does not in general exist, unless for the purposes of citation.[8]

12. The domicile of an incorporated trading company may differ from the place where its manufacturing or trading operations are carried on. The domicile must be fixed at a definite place within a given country. The domicile of a company registered in Scotland under the Companies Acts is in Scotland. But the registration is not in all cases decisive.[1] The question is, where is the real business of the company carried on? The answer to this, in the main, determines the domicile of the company.[2] Hence a company may carry on business in a country without being domiciled there.[3]

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[1] 8 Edw. VII. c. 69.
[2] 3 & 4 Geo. V. c. 25.
[3] 7 & 8 Geo. V. c. 18.
[4] 7 & 8 Geo. V. c. 28.
[5] Dicey, Conflict of Laws, 4th ed., p. 151 *et seq.*
[6] *Calcutta Jute Co.* v. *Nicholson*, 1876, 1 Ex. D. 428, at p. 446.
[7] *Carron Iron Co.* v. *Maclaren*, 1855, 5 H.L.C. 416, at p. 450; but see Dicey, p. 154.
[8] See Dicey, *ut supra, et seq.*

SECTION 4.—JURISDICTION.

13. A company is subject to the jurisdiction of the Courts of its domicile, but also, if it has in another territory a branch at which contracts are entered into and claims settled, of the Courts of that territory.[4] But the office of an agent is not the office of the company.[5] And where a company has places of business or branch offices in different counties, the sheriff within whose jurisdiction a contract was entered into has jurisdiction in actions relating to it.[6] The true test is whether the foreign corporation is conducting its own business at some fixed place within the jurisdiction.[7] Scottish companies having a place of business in England are subject on that ground to citation to the English Courts.[8] On the same principle a foreign or colonial company carrying on business in Britain through a branch office may be ordered to be wound up in Britain; [9] but the winding-up here will only be ancillary if the company is also being wound up abroad.[10] Where the registered office is destroyed or there is no place of business, a summons should be served at the only or last registered office as returned to the registrar.[11]

14. A company may by contract subject itself to the jurisdiction of the Courts of a foreign country,[12] and service of a writ or summons may be effected by leaving the document with its agent appointed for that purpose.[13] The Scottish Courts have jurisdiction over any company by reason of its possessing heritage in Scotland or of arrestment of its assets in Scotland for that purpose. Conventions have been entered into between Britain and other countries mutually securing to industrial and commercial companies the exercise of their rights and the right of appearing before tribunals.

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[1] *Calcutta Jute Co., supra*; *Laidlay's Trs.* v. *Lord Advocate*, 1890, 17 R. (H.L.) 67.

[2] *Carron Iron Co.* v. *Maclaren, supra*; Dicey, Conflict of Laws, p. 153.

[3] *Wingate & Co.* v. *Inland Revenue*, 1897, 24 R. 939; contrast *Crookston Bros.* v. *Inland Revenue*, 1911 S.C. 217.

[4] *Haggin* v. *Comptoir d'Escompte de Paris*, 1889, 23 Q.B.D. 519.

[5] *Laidlaw* v. *Provident Plate Glass Insurance Co., Ltd.*, 1890, 17 R. 544.

[6] *Harris* v. *Gillespie, Cathcart & Fraser*, 1875, 2 R. 1003.

[7] Per Collins M.R. in *Dunlop Pneumatic Tyre Co.*, [1902] 1 K.B. 347; see *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C. 455.

[8] See *Logan* v. *Bank of Scotland*, [1906] 1 K.B. 141, where plea of *forum non conveniens* was considered.

[9] *Marshall*, 1895, 22 R. 697.

[10] *In re Matheson Bros., Ltd.*, 1884, 27 Ch. D. 225; *In re Commercial Bank of South Australia*, 1886, 33 Ch. D. 174; *Queensland Mercantile and Agency Co., Ltd.* v. *Australasian Investment Co., Ltd.*, 1888, 15 R. 935.

[11] See *Fortune Copper Mine of Western Australia*, 1870, L.R. 10 Eq. 390, for English practice—the actual place of business.

[12] *Société Industrielle des Lectain* v. *Huelva*, 1889, W.N. 32

[13] *Montgomery* v. *Liebenthal*, [1898] 1 Q.B. 487.

15. In the liquidation of a company the Courts of the domicile of the company have jurisdiction over all contributories in the winding-up.[1] The Court of Session has jurisdiction in the winding-up of all companies registered in Scotland.[2] The Court in England makes the decree of the Scottish Court an order of the Chancery Division of the High Court.[3] And questions arising in the liquidation will not be dealt with except in the Court of the liquidation.[4] In the same way the Scottish Courts will also, as an administrative act, enforce against a contributory the order of an English or Irish Court whether for payment of money or *ad facta præstanda*.[5] But in the absence of an express contract the Courts of this country may not recognise the jurisdiction of a foreign Court of liquidation over a British contributory of a non-British company.[6]

PART II.—COMPANIES UNDER THE COMPANIES ACTS, 1908 TO 1917.

SECTION 1.—IN GENERAL.

SUBSECTION (1).—*Repeal of Former Acts, and Savings from Repeal.*

16. The repeal of Acts[7] is elaborate. The Acts repealed are enumerated in the First Part of the Sixth Schedule, and embrace the whole of the Companies Acts of 1862, 1864, 1867, 1870, 1877, 1879, 1880, 1883, 1886, three Acts of 1890, 1893, 1898, 1900, and 1907. But there is a necessary qualification that the repeal shall not affect (*a*) the incorporation of any company under any repealed enactment; (*b*) and (*c*) the Tables B and A respectively of the 1856 and 1862 Acts, so far as applying to the memorandum and articles of any company existing at the commencement of the Act of 1908. Two clauses of the Banking Companies Acts of 1844 and 1857, reproduced in the Sixth Schedule, Part II., are continued in force. Further, it is provided that the mention of particular matters in the repealing (s. 286) or any other section of the Act of 1908 is not to prejudice the operation of s. 38 of the Interpretation Act, 1889, with regard to the effect of repeals.[8] Other savings are specifically set out (ss. 287–294), the last of which is the provision in s. 5 of the Trade Union Act of 1871,[9] that the Companies

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[1] *Moyes* v. *Whinney*, 1863, 3 M. 183.

[2] 1908 Act, s. 135; but see *Grieve* v. *Kilmarnock Motor Co.*, 1923, S.L.T. 308.

[3] *City of Glasgow Bank*, 1880, 14 Ch. D. 628; as to enforcing orders outwith jurisdiction, see *Liqrs. of California Redwood Co.* v. *Walker*, 1886, 13 R. 810.

[4] *Carbon (New) Syndicate* v. *Seton*, 1904, 12 S.L.T. 191.

[5] *London and Scottish Bank*, 1866, 4 M. 1101; *Queensland Mercantile and Agency Co., Ltd.* v. *Australasian Investment Co., Ltd.*, 1888, 15 R. 935. See Codifying Act of Sederunt, E, iv. 4, as to decrees for payment of money.

[6] *Emmanuel* v. *Symon*, [1908] 1 K.B. 302; see Wilton on Company Liquidation, p. 138.

[7] 1908 Act, s. 286.

[8] *Smith's Trs.* v. *Irvine and Fullarton Property Investment and Building Society*, 1903, 6 F. 99.

[9] 34 & 35 Vict. c. 31.

Acts, 1862 and 1867, shall not apply to any trade union; and that the registration of any trade union under any of the said Acts shall be void.[1] The prohibition under the Trade Union Act holds, though the Acts of 1862 and 1867 are repealed.

SUBSECTION (2).—*Interpretation.*

17. The interpretation section of the Act of 1908 (s. 285) contains nineteen words or expressions used throughout the Act, many of which are now quite familiar. The Act of 1862 had no interpretation clause. The definition of "company" does not include a foreign company.[2] In interpreting a consolidating statute the judicial interpretation of a word or phrase with a like context in an earlier statute may be considered.[3]

SUBSECTION (3).—*Application of Act of* 1908 *to Existing Companies without Re-registration.*

18. An "existing company" means in the Act, unless the context otherwise requires, and subject to the provisions of Part VI. and of s. 286, a company formed and registered under the Joint Stock Companies Acts, or under the Companies Act, 1862 (s. 285). The Act is made to apply to existing companies in the same manner, in the case of a limited company other than a company limited by guarantee, as if the company had been formed and registered under the Act as a company limited by shares; in the case of a company limited by guarantee, as if the company has been formed and registered under the Act as a company limited by guarantee; and in the case of a company other than a limited company, as if the company had been formed and registered under the Act as an unlimited company. It is, however, provided that reference, express or implied, to the date of registration shall be construed as a reference to the date at which the company was registered under the Joint Stock Companies Acts, or under the Companies Act, 1862, as the case may be (s. 245). The Act is further made to apply to every company registered but not formed under the Joint Stock Companies Acts or the Companies Act, 1862 (s. 246), and to every unlimited company registered in pursuance of the Companies Act, 1879 (s. 247).

SUBSECTION (4).—*Companies which may Register under the Act of* 1908 *although not Formed thereunder.*

19. Under the Act of 1862 it was provided that companies existing at the commencement of the Act, including any company registered under the Joint Stock Companies Acts, might register under it.[1] Most of the companies so registering were old companies formed by deed of settlement or charter or letters patent obtained before the Act of 1862. This authorisation is repeated under the Act of 1908 (ss. 249–255). The company to be registered must consist of seven or more members. A company formed after the 1862 Act, whether before or after the Act of 1908, in pursuance of any Act of Parliament other than the 1908 Act, or of letters patent, or being a company within the stannaries, or being otherwise duly constituted by law, may also so register. A joint-stock company can register only as a company limited by shares. Any other company registering under Part VII. must do so as a company limited by guarantee or as unlimited. By registration the benefits of limited liability and incorporation are obtained. Registration for the purpose of liquidation is permissible. An unregistered company, without any power under its deed of settlement to dispose of its business to another company by sale or transfer, may carry out an amalgamation scheme by registering, and then passing a resolution for voluntary liquidation with a direction to the liquidator to carry out the agreement.[2]

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[1] *Aberdeen Master Masons' Incorporation* v. *Smith*, 1908 S.C. 669.

[2] *Thomas* v. *United Butter Companies of France, Ltd.*, [1909] 2 Ch. 484.

[3] Maxwell on Interpretation of Statutes, 6th ed., p. 48. See Lord Macnaghten in *Williams* v. *Permanent Trustee Co. of New South Wales*, [1906] A.C. 249.

20. No company may be registered in pursuance of these provisions without the assent of specified majorities of its members (s. 249 (2) (*d*)). Various limiting provisions, incident to registration under Part VII. and consequential provisions and special provisions applicable to banking companies, are set forth in the Act (ss. 249–266).

SUBSECTION (5).—*Companies which must be Registered under the Act of* 1908.

21. The Act of 1908 provides (s. 1 (1)): "No company, association, or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent." The Act further provides: "No company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within the stannaries and subject to the jurisdiction of the Court exercising the stannaries jurisdiction" (s. 1 (2)). Any such companies not so registering are illegal associations. The statute means to deal, not with people who are associated together for the purpose of obtaining gain, but with people who are associated together for the purpose of carrying on a business having for its object the acquisition of gain.[1] "Association" may cover the case of a combination of firms or individuals in different parts of the world in regard to particular adventures in which they have a joint interest.[2] "Business" is a word of large and indefinite import and has a more extensive signification than "trade."[3] An instance of a company formed in pursuance of some other Act of Parliament is noted below.[4]

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[1] 25 & 26 Vict. c. 89, Pt. vii. s. 179 *et seq.*

[2] Sec. 192; *Southall* v. *British Mutual Life Assurance Society*, 1871, L.R. 6 Ch. 614. As to the mode of registering, see Palmer's Company Law, 12th ed., p. 410.

SECTION 2.—PROMOTION OF COMPANIES.

SUBSECTION (1).—*Meaning of the Term "Promoter."*

22. The term "promoter" was for the first time defined in the Directors' Liability Act, 1890 (s. 3 (2)). It is again defined in the Act of 1908 (s. 84 (5)) with reference to liability for misstatements in a prospectus. For that purpose "the expression 'promoter' means a promoter who was a party to the preparation of the prospectus, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company." The constitution of a company is merely a means to an end—the carrying on by the company of some business, or the working of a mine or a patent or other enterprise. It is the person called a promoter who determines what this end shall be and who sets the statutory machinery of formation in motion. "Promoter" is a term not of law but of business, summing up a number of business operations familiar to the commercial world by which a company is generally brought into existence.[5] Preparing or settling the prospectus, negotiating agreements between vendors and an intended company, obtaining directors, making contracts for the company, or otherwise actively engaging either alone or in co-operation with others in the formation of a joint-stock company will make a man a promoter;[6] but a mere projector is not a promoter.[7] Whether a person is or is not a promoter is a question of fact, not of law, and must in each case be determined with due regard to all the circumstances.[8]

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[1] Per Lord Esher as Brett L.J. in *Smith* v. *Anderson*, 1880, 15 Ch. D. 247, at p. 278; cf. *Campbell* v. *Campbell* (O.H.), 1917, 1 S.L.T. 339; *One and All Sickness and Accident Assurance Association*, 1909, 25 T.L.R. 674; *Greenberg* v. *Cooperstein*, [1926] 1 Ch. 657; contrast *Scottish Investment Trust Co., Ltd.* v. *Inland Revenue*, 1893, 21 R. 262.

[2] *Smith* v. *Anderson, supra.*

[3] Per Jessel M.R., *ibid.*

[4] *Smith's Trs.* v. *Irvine and Fullarton Property Investment and Building Society*, 1903, 6 F. 99.

[5] See Bowen L.J. in *Whaley Bridge Printing Co.* v. *Green*, 1879, 5 Q.B.D. 109.

[6] *E.g. Bognall* v. *Carlton*, 1877, 6 Ch. D. 371; *Emma Silver Mining Co.* v. *Grant*, 1879, 11 Ch. D. 918, at p. 936.

[7] *Erlanger* v. *New Sombrero Phosphate Co.*, 1887, 3 App. Cas. 1218, at p. 1235.

[8] *Whaley Bridge Printing Co., supra.* See also Palmer's Company Law, 12th ed., p. 352, and cases there cited.

SUBSECTION (2).—*Fiduciary Relation of Promoters to the Company.*

23. Promoters stand undoubtedly in a fiduciary position.[1] "They have in their hands the creation and moulding of the company; they have the power of defining how and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation."[1] It is the promoter who selects the directors, who gives them such powers as he chooses. It is he who settles the regulations of the company—regulations under which the company, as soon as it comes into existence, may find itself bound to do anything, not in itself illegal, which the promoter may have chosen. This control of the promoter over the company involves a correlative responsibility, and out of this responsibility arises the doctrine, now well settled, of the fiduciary relation of the promoter towards the company he creates. It is an artificial doctrine, an extension of the doctrine of agency, a sort of agency by anticipation; for the promoter is not, strictly speaking, an agent of or trustee for the company before incorporation, and he cannot be agent for a non-existent company. But it is a salutary aad necessary fiction of equity for the protection of the company which afterwards consciously and voluntarily adopts and becomes a party to the transaction.

24. In virtue of this fiduciary relationship, the promoter, or even the firm of which he is a partner, is accountable to the company for all moneys secretly obtained by him from it.[2] A promoter may not make a profit out of a company he promotes, unless he makes full and fair disclosure to the shareholders of the company of what he is getting, and they assent to it.[3]

SUBSECTION (3).—*Disclosure Necessary to Avoid Liability.*

25. There are three sources from which a promoter may get a profit legitimately, *i.e.* provided he makes full and fair disclosure. He may get it (1) from the company; (2) from the company's vendor; or (3) he may be at once promoter and vendor.

26. Where a promoter gets his profit from the company it is sufficient disclosure that the articles of the company provide that a certain sum shall be paid by the company to its promoter for his services.[4] The promoter may receive a commission from the vendor in cash or fully-paid shares, provided it be disclosed. The Act (s. 81 (*i*)) provides that every prospectus issued by or on behalf of any person who is or has been engaged or interested in the formation of the company must state the amount paid within the two preceding years, or intended to be paid, to any promoter, and the consideration for any such payment. If the commission or payment be made to a firm of which the promoter is a partner there must equally be disclosure to the shareholders, and the sum paid to the firm may be recovered if not disclosed.[1] Further, if the prospectus omits to give the information required by the Act (s. 80) or makes any untrue statement, a promoter may be held liable to compensate subscribers for any damage sustained by them.[2] The nature of the remuneration which a promoter may receive and the conditions under which he may receive it are fully discussed in the text-books.[3]

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[1] *Erlanger* v. *New Sombrero Phosphate Co.*, *supra*, at p. 1236, per Lord Cairns.

[2] *Huntington Copper Co.* v. *Henderson*, 1877, 4 R. 294; *Mann* v. *Edinburgh Northern Tramways Co.*, 1891, 18 R. 1140; 1892, 20 R. (H.L.) 7.

[3] See 1908 Act, s. 89.

[4] *Huntington Copper Co.* v. *Henderson*, 1877, 4 R. 294, per Lord Young, Ordinary, at p. 302; *Scott* v. *Money Order Co. of Great Britain and Ireland*, 1870, 42 Sc. Jur. 212.

27. Where a promoter desires to sell his own property to the company, which he is quite entitled to do, he is bound to protect the company he has created,[4] by furnishing it with an independent and competent board of directors, and by disclosing his interest in the property to the directors, so that they can exercise an intelligent judgment on the transaction. It may not, however, be the duty of the promoters of a company to provide it with an independent board of directors if full disclosure is made to those who are induced by the promoters to join the company.[5] But a promoter-vendor cannot evade the duty of disclosure by putting in a nominee-vendor to sell to the company.[6] And a mere constructive disclosure, that is, a disclosure of something which if further investigated will enable an inquirer to ascertain the profits made, is not sufficient.[7] Where as the ostensible consideration for the sale the promoter had received an allotment of shares of the company, the allotment being void and the shares worthless, but by realising the shares he had in fact obtained money, he was held bound to account to the company for secret profits so made by him, as having been put by the company in control of something out of which he had made the profits.[8] But there is no presumption of law that a promoter who, after the promotion has commenced, acquires property and sells it to the company, does so as trustee for the company. It is a question of fact in each case.[9]

SUBSECTION (4).—*Remedy against Promoter for Illegal Profits.*

28. Where there is a failure of disclosure by the promoter the sale may be set aside at the instance of the company. If rescission is impossible the company is entitled to damages, the measure being the difference in value between the price paid by the company and the actual value of the property at the date of the purchase.[1]

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[1] *Scottish Pacific Coast Mining Co., Ltd.* v. *Falkner, Bell & Co.*, 1888, 15 R. 290.

[2] See *infra*, Prospectus, para. 117 *et seq.*

[3] See Palmer's Company Law, p. 355.

[4] *Erlanger* v. *New Sombrero Phosphate Co., Ltd.*, 1887, 3 App. Cas. 1236, opinion of Lord Cairns, L.C.

[5] See the opinion of Lindley M.R. in *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, [1899] 2 Ch. 392, 422.

[6] *Glasier* v. *Rolls*, 1889, 42 Ch. D. at 442.

[7] *The Olympia Ltd.*, [1898] 2 Ch. 153 ; *Gluckstein* v. *Barnes*, [1900] A.C. 240.

[8] *Jubilee Cotton Mills, Ltd.* (*Official Receiver and Liquidator*) v. *Lewis*, [1923] 1 Ch. 1 ; [1924] A.C. 958.

[9] *Omnium Electric Palaces* v. *Baines*, [1914] 1 Ch. 332.

SUBSECTION (5).—*Payment by Company of Promoter's Expenses.*

29. A promoter can only recover from the company what he has paid in preliminary expenses where he proves a contract by the company to pay.[2] This applies even to the registration fees.[3] The contract must be a valid one, not *ultra vires* of the company to implement.[4] Where the expenses have been incurred to a promoter for professional services, that will not bar their recovery by him from the company.[5] The terms of the articles of association may entitle an employee of the promoters to claim from the company remuneration for services incident to the organisation of the company.[6]

SUBSECTION (6).—*Promoters' Liability to Each Other.*

30. Persons combining as promoters of a company are not necessarily partners so as to be liable for each other's acts,[7] but they may be so liable.[8] Promoting syndicates, incorporated and unincorporated, are very common now.

SECTION 3.—FORMATION AND REGISTRATION.

SUBSECTION (1).—*In General.*

(i) *Registration Office.*

31. Part V. of the Act (s. 243) directs the establishment of offices for the registration of companies under the Act, the continuance of offices existing at the commencement of the Act being provided for (s. 289). The office is under the control of the Board of Trade, which appoints the Registrar and other officers. On payment of certain fees any person may inspect documents, and may require a certificate of the incorporation of the company and certified copies of other documents to be issued (s. 243 (6)).

(ii) *Fees.*

32. Table B of the First Schedule to the Act contains a Table of Fees payable to the Registrar (s. 244). The fees on registration are proportioned to the amount of the capital.[1] The solicitor paying fees must look to his clients, the promoters, for payment of his account.[2] There is no greater obligation to repay statutory fees expended prospectively for the company's benefit than fees for framing its constitution. The articles may provide for their payment.[3]

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[1] *In re Leeds and Hanley Theatre of Varieties, Ltd.*, [1902] 2 Ch. 809.

[2] *English and Colonial Produce Co.*, [1906] 2 Ch. 435.

[3] *National Motor Mail Coach Co.*, [1908] 2 Ch. 515, overruling *English and Colonial Produce Co.* on this point.

[4] *Mason's Trs.* v. *Poole & Robinson*, 1903, 5 F. 789; *Mann* v. *Edinburgh Northern Tramways Co.*, 1892, 20 R. (H.L.) 7.

[5] *Edinburgh Northern Tramways Co.* v. *Mann*, 1896, 23 R. 1056.

[6] *Scott* v. *Money Order Co. of Great Britain*, 1870, 42 Sc. Jur. 212.

[7] *Hamilton* v. *Smith*, 1858, 5 Jur. 32; *Reynell* v. *Lewis*, 1846, 15 M. & W. 517, 529.

[8] *Ibid.*; see also *Molleson & Grigor* v. *Fraser's Trs.*, 1881, 8 R. 630.

(iii) *Registration under Part VII. of the Act.*

33. The leading proposition of Part VII. of the Act is that any company consisting of seven or more members, in existence when the Act of 1862 came into operation, and any such company formed after that date in pursuance of any Act of Parliament (other than the 1908 Act), or letters patent, or being a company within the stannaries, or otherwise duly constituted according to law, may at any time register under the Act either (1) as an unlimited company; or (2) as a company limited by shares; or (3) as a company limited by guarantee; and the registration may be with a view to winding-up (s. 249). This power or permission is fenced with many conditions and requirements (ss. 249 and 252 *et seq.*). *Inter alia*, the registrar's certificate of registration is conclusive that the company is authorised to be registered (s. 259).[4] The rights or liabilities of the company in respect of any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of the company prior to registration are preserved (s. 261). The regulations of Table A do not apply to the company unless adopted by special resolution (s. 263 (ii)). The effect of registration under this Part of the Act is also defined (s. 263). These sections have not received much judicial elucidation.[5]

(iv) *Registration of Unlimited Company as Limited, and Re-registration of Limited Company.*

34. Companies already registered as unlimited may register as limited,[6] and companies registered as limited may re-register as limited in pursuance of the provisions of s. 57.[7] An unlimited company altering its memorandum with a view to registration as a limited company, should first register under s. 57 as a limited company.[1] The debts, liabilities, obligations, or contracts of the unlimited company incurred or entered into prior to registration are unaffected by the registration as limited, and are enforceable under the provisions of Part VII. of the Act (s. 57 (1)).

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[1] Table B; as to capital duty see s. 112 of the Stamp Act, 1891, and s. 39 of the Finance Act, 1920 (10 & 11 Geo. V. c. 18), increasing the capital duty payable under the Stamp Act. See also Finance Act, 1921 (11 & 12 Geo. V. c. 32), s. 59.

[2] *English and Colonial Produce Co.*, [1906] 2 Ch. 435; *National Motor Mail Coach Co.*, [1908] 2 Ch. 515.

[3] *Niven* v. *Collins Patent Gear Co.*, 1900, 7 S.L.T. 476; 8 S.L.T. 96; *Scott* v. *Money Order Company of Great Britain and Ireland*, 1870, 42 Sc. Jur. 212; Table A, Art. 71, Companies Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 17), s. 68.

[4] *In re George Newman & Co.*, [1895], 1 Ch. 674; *Hammond* v. *Prentice Bros.*, [1920] 1 Ch. 201.

[5] For the mode and objects of registration under Part VII., see Palmer's Company Law, 12th ed., p. 410, and notes to the sections in Wilton's Company Law and Practice.

[6] This provision in the Act of 1879 was the outcome of the stoppage of the City of Glasgow Bank.

[7] The purpose or value of this provision is obscure.

35. An unlimited company registering as limited may by its resolution for registration, where it has a share capital, increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purpose of the company being wound up (s. 58). It may also provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the like event and for the like purposes (*ibid*).

SUBSECTION (2).—*Company Limited by Shares.*

(i) *Memorandum and Articles of Association.*

36. The Legislature provides in the Act of 1908 (s. 2) very simple machinery for the formation of a company limited by shares. Any seven or more persons (two if a private company, as after defined), associated for any lawful purpose, may, by subscribing their names to a Memorandum of Association, and otherwise complying with the requirements of the Act in respect of registration, form an incorporated company with limited liability. The effect of the corresponding section of the Act of 1862 was considered by the House of Lords in the case of *Salomon*,[2] the so-called "one-man company" case, and the true meaning of the Legislature must now be taken to be that when the formalities prescribed by the Act have been complied with, and there is a memorandum subscribed by seven persons for one share each, the company, however small, when duly registered, came into existence as a real independent legal entity or *persona*, and cannot be treated as a sham or an *alias* for the promoter merely because six of the seven subscribers are his nominees or even trustees—mere dummies—nor does it signify what were the motives or schemes of the promoter.

37. The memorandum of association which is to form the basis of incorporation must bear the same stamp as if it were a deed, and must be signed by each subscriber in the presence of, and the signatures be attested by, one witness at least (s. 6). There must be not less than seven subscribers,[3] and in the case of a private company not less than two. In England an agent may subscribe and need not be authorised by deed.[4] In Scotland mandate may be proved by parole.[5] A foreigner may subscribe.[1] A married woman may subscribe. A minor having curators may subscribe along with them; and even a minor without curators may subscribe, but the transaction would be open within the *quadriennium utile* to reduction at his instance on the ground of minority and lesion.[2] An incorporated company having the requisite power, a firm, or several persons jointly, may subscribe.

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[1] *Proprietors of Royal Exchange Buildings, Glasgow,* 1911 S.C. 1337.

[2] *Salomon* v. *Salomon & Co.*, [1897] A.C. 22.

[3] *In re National Debenture and Assets Corporation,* [1891] 2 Ch. 505.

[4] *In re Whitley Partners,* 1886, 32 Ch. D. 337.

[5] In *Second Edinburgh Starr-Bowkett Building Society* v. *Aitken*, 1892, 19 R. 603, it was held that the words "testified by their signatures" in the Building Societies Act, 1874 (which are substantially the same as "subscribing their names" in the Companies Acts), do not warrant signature by mandataries to an instrument of dissolution.

38. When subscribed and stamped, the memorandum, together with the articles, if any (s. 15), is to be taken to the Registrar to be registered. The duty of the Registrar is merely to see that the documents presented are in proper form. If they are *ex facie* regular, his duty is to retain and register them.[3] In Scotland a statutory declaration by an enrolled law agent engaged in the formation of the company, or by a person named in the articles as a director or secretary of the company, of compliance with the requirements of the Act must be produced to the Registrar, and the Registrar may accept such declaration as sufficient evidence of compliance (s. 17 (2)).[4] On registration the Registrar gives his certificate of incorporation (s. 6), and this certificate is conclusive that all the requirements of the Act in respect of registration, and of matters precedent and incidental thereto, have been complied with, and that the association is a company authorised to be registered, and duly registered, under the Act.[5] The Court can be applied to, if necessary, for an order upon the Registrar to issue the certificate. A copy of the certificate certified by the Registrar or his assistant is equivalent to the original as regards its admissibility in evidence in all legal proceedings (s. 243 (7)). The duty chargeable on registration on the nominal capital of a company limited by shares is now an *ad valorem* stamp duty at the rate of £1 for every £100.[6]

39. The form and contents of the memorandum of association of a company limited by shares are prescribed by the Act.[7] It must contain the following particulars: (1) The name of the company, with "Limited" as the last word in its name; (2) the part of the United Kingdom, whether England, Scotland, or (Northern) Ireland, in which the registered office of the company is to be situate; (3) the objects of the company; (4) that the liability of the members is limited; and (5) the amount of share capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount. Further, no subscriber may take less than one share, and each subscriber must write opposite to his name the number of shares he takes. There is nothing illegal in the insertion in the memorandum of additional provisions, but if inserted without qualification they become conditions of the company's constitution and cannot be altered[1] unless under a scheme of arrangement.[2] The subscribers to the memorandum have a complete discretion as to the powers with which the company shall be endowed, provided they be not illegal. But the objects must not include anything in contravention of the Act, *e.g.* issuing shares at a discount; or of the general law, *e.g.* establishing lotteries, or making the company a trade union (s. 294). The sufficiency of any statement of objects to comply with the statute cannot be challenged once the certificate of incorporation is issued, it being conclusive evidence of compliance with the preliminary conditions.[3]

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[1] *Princess of Reuss* v. *Bos*, 1871, L.R. 5 H.L. 176, 199.

[2] *Hill* v. *City of Glasgow Bank*, 1880, 7 R. 68. The law in England is quite different.

[3] *In re Nassau Phosphate Co.*, 1876, 2 Ch. D. 610; *Peel's* case, 1867, L.R. 2 Ch. 674, at p. 682; *Princess of Reuss, supra.*

[4] Form 41 annexed to Order of Board of Trade of 29th March 1909.

[5] Sec. 17; and see Companies (Converted Societies) Act, 1910. See observations of Lord Sumner in *Jubilee Cotton Mills, Ltd.* v. *Lewis*, [1924] A.C. at 973, as to the practice in dating certificates of incorporation.

[6] Stamp Act, 1891, s. 112; Finance Act, 1899, s. 7; Finance Act, 1920, s. 39; Finance Act, 1921, s. 59.

[7] Sec. 3, Third Schedule, Form A.

40. The memorandum may be, and usually is, accompanied, when registered, by articles of association. The articles, which are to be expressed in separate paragraphs numbered consecutively and printed (ss. 10–12), are the company's rules of internal government.[4] If no articles are registered, the model articles, the regulations of Table A of the First Schedule of the Act, are to apply. Having received the *imprimatur* of the Legislature, these cannot be held *ultra vires*.[5] A third course may be followed, to have a short set of articles modifying or adding to Table A, and otherwise leaving it to operate. Like the memorandum, the articles are to be stamped as a deed and signed by each subscriber in the presence of, and attested by, one witness at least (s. 12).

41. Every company must send to every member, at his request, and on payment of one shilling or such less sum as the company may prescribe, a copy of the memorandum and of the articles, if any (s. 18).

(ii) *Public Company.*

42. A public company is not defined in the Act, but its essential feature is the absence of the statutory limitations imposed upon a statutory private company.[6]

(iii) *Private Company.*

43. A private company was first defined by the Companies Act, 1907 (s. 37). The term private company has been in use for over thirty years as meaning a company that was intended to be carried on without calling in the public or issuing any shares except to the existing shareholders.[1] The term has now a technical sense and the private company has precisely defined incidents. It has also special privileges and immunities, and exceptional facilities in regard to its formation, and is specially exempted from various requirements imposed upon the management of public companies.[2] By the Act of 1900, though the description "private company" was not used, a distinction was drawn between "a company which does not issue any invitation to the public to subscribe for its shares" and other companies. The Act of 1907 (s. 37) took a further step and defined "private company" as "a company which, by its articles (*a*) restricts the right to transfer its shares, (*b*) limits the number of its members, exclusive of persons who are in the employment of the company, to fifty, and (*c*) prohibits any invitation to the public to subscribe for any shares or debentures of the company." This definition is reproduced in the Act of 1908 (s. 121). The Act of 1913 [3] further extends the class of persons who are not to be computed in reckoning the membership to persons who, having been formerly in the employment of the company, were while in such employment, and have continued after the determination of such employment to be, members of the company. The three requirements of s. 121 of 1908 must be clearly provided for in the articles. A power to the directors to refuse to pass any transfer, even of fully-paid-up shares, will satisfy the first limitation. Where the company's articles contain the required restrictions, it remains a private company though these be not observed,[4] but it ceases to be entitled to certain privileges and exemptions of a private company.[5]

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[1] Sec. 7; *Ashbury* v. *Watson*, 1885, 30 Ch. D. 376; *Welsbach Incandescent Gas Light Co.*, [1904] 1 Ch. 87.

[2] See s. 120; but see *Incorporated Glasgow Dental Hospital* v. *Lord Advocate*, 1927 S.N. 30.

[3] *Cotman* v. *Brougham*, [1918] A.C. 514.

[4] *Lawrence's* case, 1866, L.R. 2 Ch. 412, at p. 424.

[5] *Lock* v. *Queensland Investment and Land Mortgage Co.*, [1896] A.C. 461.

[6] *q.v. infra.*

44. A private company, like limited companies generally, is constituted by registration with memorandum and articles of association. The application to register must be signed by the subscribers and be in a special form shewing that the company does not issue an invitation to the public to subscribe. It must also be ascertained by the statutory declaration that all the requirements of the Act in respect of registration and of matters precedent and incidental thereto have been complied with (s. 17). Thereupon the certificate of incorporation is issued and the company, unlike a public company,[6] can commence business at once. "It attains maturity at its birth." [7]

45. Distinctive features of a private company are as follows: (1) It may consist of a minimum of two persons instead of seven; [8] (2) if Table A be adopted, Articles 35 to 40, dealing with share warrants to bearer, must be excluded; (3) it does not require to file, prior to the first allotment of either shares or debentures, the statement in lieu of prospectus required by s. 82 (1); [9] (4) a director may be appointed without first signing and filing with the Registrar a consent in writing to act as such director, or if the articles require a share qualification for the directors, without signing the memorandum or filing with the Registrar a contract to take qualification shares (s. 72 (3)); (5) it does not require to include in the annual summary the statement in the form of a balance-sheet as required of these companies by s. 26 (3); (6) it does not require, although bound to convene a statutory meeting,[1] to forward to its members or to file with the Registrar (under s. 65) the report as to the position of the company, which has to be sent to the members seven days before the statutory meeting; (7) it is exempt from the provisions giving to holders of preference shares and debentures the same rights as holders of ordinary shares to receive and inspect balance-sheets, reports of auditors, and other reports (s. 114); (8) it may pay underwriting commission without making "an offer of shares to the public" for subscription (required under s. 8 of the Act of 1900). It must, however, file a statement in the prescribed form disclosing the amount or rate of commission (s. 89 of the Act of 1908). It is advisable this should be done before payment is made.[2] (9) It must send with the annual list of members and summary (required by s. 26 of the Act of 1908) a certificate signed by a director or the secretary that the company has not since the date of the last return, or in the case of a first return since the date of its incorporation, issued any invitation to the public to subscribe for any shares or debentures of the company; and, where the list of members discloses the fact that the number of members of the company exceeds fifty, also a certificate that such excess consists only of persons who (under s. 121 of the Act of 1908 as amended by s. 1 of the Act of 1913) are to be excluded in reckoning the number of fifty; and (10) if its membership is reduced below two it may be wound up by the Court (s. 129); and if the number of members is reduced below two, and it carries on business for more than six months while the number is so reduced, every person cognisant of the fact who is a member during the time that it so carries on business after that six months is severally liable for the whole of the debts contracted during that time (s. 115). The Registrar of Companies, instructed by the Board of Trade, will not recognise as a private company a company that retains the power to issue share warrants, such power being regarded by the Board as inconsistent with restriction on the transfer of shares.

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[1] Cotton L.J. in *In re British Seamless Paper Box Co.*, 1881, 17 Ch. D. 467; see also Lord Macnaghten in *Salomon* v. *Salomon*, [1897] A.C. 22.

[2] As to the objects sought, and the advantages accruing by the conversion of a trading or other concern into a private company, see Palmer's Company Law, 12th ed., p. 392 *et seq.*

[3] 3 & 4 Geo. V. c. 25.

[4] *Park* v. *Royalties Syndicate*, [1912] 1 K.B. 330.

[5] 3 & 4 Geo. V. c. 25, s. 1 (1).

[6] See *infra*, para. 266 (Commencement of Business).

[7] Lord Macnaghten in *Salomon*, *supra*, at p. 51.

[8] Act of 1908, s. 2.

[9] *Ibid.*, s. 82 (2).

46. The Act of 1908 (s. 121) empowers a private company, subject to anything contained in the memorandum or articles, by passing a special resolution and by filing a statement in lieu of prospectus and the statutory declaration required of a public company before commencing business, to turn itself into a public company. It has not been decided whether a company, private in the sense as understood prior to 1907 (*i.e.* that it did not invite the public subscription of its shares), can turn itself into a private company under s. 121. There is no express prohibition against this course, and it has been often done without exception being taken by the Registrar.

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[1] *Gardner* v. *Iredale*, [1912] 1 Ch. 700.

[2] Palmer's Company Law, 12th ed., p. 390.

SUBSECTION (3).—*Company Limited by Guarantee.*

47. A company limited by guarantee is defined in the Act of 1908 (s. 2) as one having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up. It may either have a minimum of seven members or be a "private company." The memorandum resembles that of a company limited by shares, but its distinctive feature is an undertaking by each member to contribute to the assets of the company in the event of its being wound up, while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs of winding up, and for the adjustment of the rights of the contributories, *inter se*, such amount as may be required, not exceeding a specified amount (s. 4 (1) (v)). The company may or may not have a share capital, and the Act of 1908 contains forms of memorandum for the alternative cases.[1] Articles of association signed by the subscribers to the memorandum and prescribing regulations for the company must be registered with the memorandum (s. 10). After registration the memorandum must be stamped with a duty (see Table B of the First Schedule). Where there is no capital divided into shares the amount is proportioned to the number of members. Hence the articles usually state that for the purposes of registration the company is to consist of a stated number of members.

48. Where a company proposes to register under Part VII. of the Act of 1908 as a company limited by guarantee, the assent is required of a majority of such of its members as are present in person or by proxy (in cases where proxies are allowed by the regulations of the company) at a general meeting summoned for the purpose (s. 249 (2) (*d*)), and the assent to register must be accompanied by a resolution in accordance with the terms of section 4 (1) (v).

49. In the case of companies limited by guarantee, and not having a share capital, and registered on or after 1st January 1901, every provision in the memorandum or articles or in any resolution of the company purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member is void,[2] and every provision in the memorandum or articles or in any resolution of such a company purporting to divide the undertaking of the company into shares or interests is to be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby (s. 21). This provision has also in view the payment of share capital duty, which might otherwise be evaded (*cf.* s. 4 (2)).

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[1] Forms B and C of the Third Schedule.

[2] *Malleson* v. *General Mineral Patents Syndicate*, [1894] 3 Ch. 538, where articles with the effect of dividing the company's undertaking into a certain number of shares effeiring to the members in equal proportions, the shares having no nominal value, were held valid, could not now be so decided.

50. Other special features of a company limited by guarantee are as follows. Directors who are *ex officio* members of the company are not as such liable on the guarantee.[1] Unless where it has a capital divided into shares the company is not required to make an annual return of its members, etc. (s. 26). The holding of a statutory meeting and the filing with the Registrar of a return of allotments is not required (ss. 65, 88). Companies licensed by the Board of Trade to be registered as limited companies without the addition of the word "Limited" to the name of the company, are mainly companies limited by guarantee, and are exempt from the obligation of sending lists of members and directors and managers to the Registrar of Companies (ss. 20, 26, 75).

SUBSECTION (4).—*Limited Company Registered without the Word Limited.*

51. Where it is proved to the satisfaction of the Board of Trade that an association about to be formed as a limited company is to be formed for promoting commerce, art, science,[2] religion, charity,[3] or any other useful object, and intends to apply its profits (if any) or other income in promoting its objects, and to prohibit the payment of any dividend to its members, the Board may by licence direct that the association be registered as a company with limited liability, without the addition of the word "Limited" to its name, and the association may be registered accordingly (s. 20 (1)). This provision is chiefly taken advantage of by companies limited by guarantee. The model form of memorandum and articles prepared by the Board of Trade, and upon the lines of which, according to its present practice, the draft memorandum must be submitted at the expense of promoters for revisal by counsel for the Board prior to the issue of a licence, can be obtained from the Comptroller of the Companies Department, Board of Trade.[4]

The phrase "any other useful object" is indicative of great latitude in the objects of the association which may be licensed.

52. A licence by the Board of Trade may be granted on such conditions and subject to such regulations as the Board think fit, and those conditions and regulations are binding on the association, and must, if the Board so direct, be inserted in the memorandum and articles or one of them.[5]

The Board has an absolute discretion as to the conditions and regulations it imposes. In dealing with companies registered in Scotland it insists upon a clause going into the memorandum by which the company funds, in so far as consisting of real estate in England, are made subject in certain events to the control of the English Courts. After an application from any association in Scotland for licence has been advertised, the Board hears objectors in London.

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[1] *The Premier Underwriting Association*, (No. 2), [1913] 2 Ch. 81.

[2] *Inland Revenue Commissioners* v. *Forrest*, 1890, 15 App. Cas. 334.

[3] *Income Tax Commissioners* v. *Pemsel*, [1891] A.C. 531.

[4] The advantages of incorporation for such associations are commented on in Palmer's Company Law, 12th ed., p. 268.

[5] Sec. 20 (2); see Palmer's Company Precedents, part i., 12th ed., p. 481 *et seq.*

53. The association on registration enjoys all the privileges of limited companies, and is subject to all their obligations, except those of using the word Limited as any part of its name, and of publishing its name and of sending lists of members and directors and managers to the Registrar of Companies (s. 20 (3)).

54. A licence may at any time be revoked by the Board of Trade, and upon revocation the Registrar must enter the word "Limited" at the end of the name of the association upon the register, and the association ceases to enjoy the exemptions and privileges granted by the Act. Before a licence is so revoked the Board must give to the association notice in writing of their intention, and afford the association an opportunity of being heard in opposition to the revocation (s. 20 (4)).

55. If any alteration is proposed to be made in the name of the company or in its memorandum or articles, the approval of the Board should again be obtained as a preliminary to judicial confirmation of such alteration.[1]

SUBSECTION (5).—*Unlimited Company.*[2]

56. An unlimited company requires a memorandum and articles of association, and may have a joint-stock capital divided into shares, or no such capital. Its name will not include the word "Limited." The memorandum specifies the name, the place of the registered office, and the objects, but not the capital (s. 5). But if the company has a share capital the articles state the amount of capital with which the company proposes to be registered, and each member requires to subscribe for one share at least.[3] If the company has not a share capital the articles must state the number of members with which the company proposes to be registered, for the purpose of enabling the Registrar to determine the fees payable on registration (s. 10.)

A company registered as unlimited may re-register as a limited company under the provisions of ss. 57 and 58 of the Act.[4] Companies formed under the Act of 1844 or by special Act, or otherwise, sometimes register as unlimited in order to wind up voluntarily.[5]

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[1] Buckley J. in *St Hilda's Incorporated College, Cheltenham*, [1901] 1 Ch. 336.

[2] These are rarely formed now. The commonest types of company formed with unlimited liability are mutual insurance associations, which are illegal unless registered, loan clubs, some banks and insurance companies.

[3] Third Schedule, Form D.

[4] See *supra*, para. 34.

[5] *Southall* v. *British Mutual Life Assurance Society*, 1871, L.R. 6 Ch. 614.

SECTION 4.—EFFECT OF MEMORANDUM AND ARTICLES.

57. The memorandum and articles are the "constituting documents" of the company,[1] but their effect depends upon registration. On the registration of the memorandum, the Registrar, it is provided, must certify under his hand that the company is incorporated (s. 16 (1)). The company is thereafter a legal entity distinct from the members.[2] From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, are a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands (s. 16 (2)). "From the date of incorporation" includes any portion of the day on which the company was incorporated, and does not mean "from the commencement of the next day."[3] The effect of incorporation under the statute is not the same as incorporation by Royal Charter.[4]

58. The effect of the memorandum and articles upon incorporation of the company is, as between the company and the members, to bind the company and the members thereof to the same extent as if these documents had respectively been signed and sealed by each member, and contained covenants on the part of each member, his heirs, executors, and administrators, to observe all the provisions of the memorandum and articles, subject to the provisions of the Act, and in particular to the powers to alter the memorandum and articles.[5] The "implied covenant" is between the members and the company.[6] In consequence the company is entitled, unless in exceptional cases, to sue its members for the enforcement, and to restrain the breach by them, of its articles,[7] and the company may be sued by a member *qua* member[8] for breach of the articles.[9]

59. The articles of the company are subordinate to and controlled by the memorandum of association, which is the dominant instrument. "The memorandum of association is, as it were, the area beyond which the action of the company cannot go; inside that area the shareholders may make such regulations for their own government as they think fit." [1] Accordingly, in so far as the articles purport to confer on the company any power beyond the company's sphere of action, they are invalid and ineffectual. If, however, there be an ambiguity in the memorandum, the articles, as a contemporaneous document, may, it is said, be used to explain it,[2] but not in respect of a matter which must be contained in the memorandum.[3]

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[1] *Liqr. of the Humboldt Redwood Co.* v. *Coats*, 1908 S.C. 751, per Lord Dunedin.

[2] Per Lord Macnaghten in *Salomon* v. *Salomon & Co.*, [1897] A.C. 22, at p. 51.

[3] *Jubilee Cotton Mills, Ltd.* v. *Lewis*, [1924] A.C. 958.

[4] See *British South Africa Company* v. *De Beers Consolidated Mines*, [1910] 1 Ch. 354; 2 Ch. 502.

[5] Sec. 14 (1); see also ss. 11 and 13.

[6] Per Lord Herschell in *Welton* v. *Saffery*, [1897] A.C. 299; *Bradford Banking Co.* v. *Briggs*, 1886, 12 App. Cas. 29.

[7] *Harben* v. *Phillips*, 1883, 23 Ch. D. 14; *Foss* v. *Harbottle*, 1843, 2 Hare 461; *Burland* v. *Earle*, [1902] A.C. 83; *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association*, [1915] 1 Ch. 881.

[8] *Eley* v. *Positive Assurance Co.*, 1875, 1 Ex. D. 20, 88; *Browne* v. *La Trinidad*, 1887, 37 Ch. D. 1.

[9] *Hickman, supra*; *Oakbank Oil Co.* v. *Crum*, 1882, 8 App. Cas. 65; 10 R. (H.L.) 11.

60. The articles, in addition to constituting a contract between the company and its members, regulate the rights of the members *inter se.* It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less regulate their rights *inter se.*[4]

61. The articles are binding on the company in a question with a member,[5] but do not constitute a contract with a third party, *e.g.* a promoter, even though also a shareholder.[6] The memorandum and articles are public documents; and accordingly anyone, whether a shareholder or outsider, who has dealings with a registered company, must be taken to have notice thereof,[7] and to have read and understood them according to their proper meaning.[8] Neglect to make inspection will not excuse such a person, but fraud forms an exception.[9] It follows that a person dealing with a company is fixed with notice of the directors' powers and any limitations thereon. On the other hand, such a person need not inquire into the regularity of the internal proceedings.[10] The rule *omnia rite acta* applies to protect him.[11] But a person dealing with the company who has notice of an irregularity cannot found upon the rule.[12] The rule is based upon the principle of convenience, for otherwise business could not be carried on.[13] The rule does not apply where there has been forgery.[14] Some articles are imperative, some directory only.[15]

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[1] Per Lord Cairns, L.C., in *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 1875, L.R. 7 (H.L) 635, 671.

[2] *Anderson's* case, 1877, 7 Ch. D. at p. 99.

[3] Per Buckley J. in *Southern Brazilian Rio Grande do Sul Rly. Co.*, [1905] 2 Ch. at p. 84.

[4] Lord Herschell in *Welton* v. *Saffery*, [1897] A.C. at p. 315.

[5] *Oakbank Oil Co.* v. *Crum*, 1882, 8 App. Cas. 65; *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association*, [1915] 1 Ch. at p. 897.

[6] *Eley* v. *Positive Assurance Co.* 1875, 1 Ex. D. 20, 88; *Browne* v. *La Trinidad*, 1887, 37 Ch. D. 1.

[7] Lord Hatherley in *Mahony* v. *East Holyford Mining Co.*, 1875, L.R. 7 H.L. 869, at p. 893.

[8] See Jessel M.R. in *Griffith* v. *Paget*, 1877, 6 Ch. D. 517; *Oakbank Oil Co.* v. *Crum*, 1882, 8 App. Cas. 65, 71.

[9] *Venezuela Central Railway* v. *Kisch*, 1867, 2 H.L.C. 99 (person dishonestly induced to acquire shares); cf. *Heiton* v. *Waverley Hydropathic Co.*, 1877, 4 R. 830.

[10] *Royal British Bank* v. *Turquand*, 1856, 6 E. & B. 527.

[11] *E.g. Day* v. *Pullinger Engineering Co.*, [1921] 1 K.B. 77; *Heiton*, *supra*; *Kreditbank Cassel* v. *Schenkers, Ltd.*, 1927, 43 T.L.R. 237.

[12] *Howard* v. *Patent Ivory Manufacturing Co.*, 1888, 38 Ch. D. 156;

[13] *Biggerstaff* v. *Rowatt's Wharf*, [1896] 2 Ch. 93 (powers of a managing director); *Duck* v. *Tower Galvanizing Co.*, [1901] 2 K.B. 314 (validity of debentures); *County of Gloster Bank* v. *Rudery & Co.*, [1895] 1 Ch. 629 (validity of a mortgage).

[14] *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439.

[15] See *Norwich Yarn Co.*, 1856, 22 Beav. 160; *Foss* v. *Harbottle*, 1842, 2 Hare 461, at p. 495.

Section 5.—Registered Office.

62. The place where the registered office is situated determines, generally, but not necessarily,[1] the domicile of the company, and *prima facie* its nationality. The Act requires (s. 62) that every company shall have a registered office to which all communications and notices can be addressed, and that notice of the situation of the registered office and of any change therein shall be given to the Registrar of Companies, who shall record the same. Once the company is registered, the registered office, although its situation may be changed locally, cannot be transferred to another part of the United Kingdom. The memorandum in regard to that is unalterable. If the company carries on business without complying with these requirements, it is liable to a fine not exceeding five pounds for every day during which it so carries on business (s. 62 (3)).

63. Summonses and other notices fall to be served upon the company at its registered office (ss. 116, 285). The register of shareholders ought to be kept in the registered office of the company for access at all times by members or creditors or others. The company, where registered in Scotland, has no power to consent to the removal of the register from the office.[2] The register of directors (s. 75), the register of mortgages, and copies of registered documents (ss. 100, 101, 102) are also to be kept there, and the right of inspection is to be exercised there, and banking, insurance, and other companies which (s. 108) must publish a balance-sheet must put a copy in a conspicuous place in the registered office.

Section 6.—Name and Change of Name.

64. The memorandum of association must contain the name of the company, with, if limited by shares or guarantee, "Limited" as the last word of its name (ss. 3, 4, and 5, and Third Schedule). No company is to be registered under a name the same as that of a subsisting company, or so nearly resembling it as to be calculated to deceive.[3]

65. The passing of a name by the Registrar will not prevent the taking of legal proceedings at the instance of any concern, whether registered or not, which is prejudiced by the registration. Where the name adopted is merely descriptive of the character of the defendant's business, and the Registrar exercises his discretion in the matter, the Courts will not interfere with his decision.[1] No company can claim the exclusive use of a common name.[2] The word "Royal" or "Imperial" must not be used as part of the name without the consent of the Home Office.[3] The prohibition against similarity of name does not apply where an existing company is being dissolved and consents in the manner required by the Registrar (s. 8 (1)). If by inadvertence a company is registered with a name identical with or closely resembling that of another company, the former may, with the sanction of the Registrar, change the name (s. 8 (2)). A company may change its name by special resolution with the approval of the Board of Trade (s. 8 (3)),[4] and the Court may make a change of name a condition of confirming an alteration of the memorandum.[5] The name of a company may sometimes be important in construing its objects as defined in its memorandum.[6]

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[1] *Calcutta Jute Co.* v. *Nicholson*, 1876, 1 Ex. D. 428.

[2] *Liqr. of Garpel Hæmatite Co.* v. *Andrew*, 1866, 4 M. 617.

[3] Instances of similarity where an injunction has been executed in England are: *Lee* v. *Haley*, 1869, L.R. 5 Ch. 155; *Hendricks* v. *Montagu*, 1882, 17 Ch. D. 638; *Tussaud* v. *Tussaud*, 1890, 44 Ch. D. 678; *Rendle* v. *Rendle & Co.*, 1890, 63 L.T. 94; *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*, [1899] A.C. 83; *Panhard et Levassor Co.* v. *Panhard Levassor Motor Co.*, [1901] 2 Ch. 513. Instances where an injunction has been refused are: *London Assurance Co.* v. *London and Westminster Assurance Corpn.*, 1863, 32 L.J. Ch. 664; *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank*, 1878, 9 Ch. D. 560; *Australian Mortgage, Land and Finance Co.*, 1880, W.N. 6; *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, [1907] 2 Ch. 312; *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, 1907 S.C. (H.L.) 15; *Scottish Union and National Insurance Co.* v. *Scottish National Insurance Co.*, 1909 S.C. 318.

66. Every limited company is required to paint or affix its name outside every office or place where its business is carried on, to have its name engraven on its seal, and to have its name mentioned in all its notices and official publications, money documents, goods orders, invoices, receipts, and other business documents (s. 63).[7] The company and its directors and managers failing to comply are liable in penalties, and directors, managers, and other officers authorising the use of a seal not so engraved or using documents wherein the name is not so mentioned incur personal liability.[8] The opinion has been expressed that the name of the company can be marked in a shortened form, without the word "Limited," upon goods manufactured or supplied by the company, such goods not being "official publications" within s. 63.[9] Where a company has been registered since 22nd November 1916, any change of name must be stated in all trade catalogues, circulars, etc., unless exempted by the Board of Trade.[10]

67. Penalties are imposed on any person or persons trading or carrying on business under any name or title of which "Limited" is the last word, unless incorporated with limited liability (s. 282).

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[1] *Rex* v. *Registrar of Companies*, [1912] 3 K.B. 23.

[2] *Dunlop Pneumatic Tyre Co., supra.*

[3] *The Carron Co.*, 1910, 26 T.L.R. 458.

[4] As to procedure, see Palmer's Company Law, 12th ed., p. 267.

[5] *Scottish Accident Co.*, 1896, 23 R. 586; *Scottish Employers' Liability and Accident Assurance Co.*, 1896, 23 R. 1016, where a change was required; *Kirkcaldy Steam Laundry Co.*, 1904, 6 F. 778; *Trust and Agency Co. of Australasia*, 1908, 25 T.L.R. 61; *Scottish-American Investment Co.*, 1891, 28 S.L.R. 421; *Northern Accident Insurance Co.*, 1893, 30 S.L.R. 834; *Australian Mutual Provident Co.*, 1908 (P.C.), 46 S.L.R. 683; *King Line, Ltd.*, 1902, 4 F. 504, where no change was required.

[6] *The Crown Bank*, 1890, 59 L.J. Ch. 739.

[7] A charitable or other company licensed under s. 20 is exempt from the obligations of this section so far as these may be covered by the general term "publication" found in the margin of s. 63, and expressed in s. 20. For procedure, see Palmer's Company Precedents, part i., 12th ed., p. 481 *et seq.*

[8] See *Penrose* v. *Martyr*, 1858, E. B. & E., 499, and *Atkins & Co.* v. *Wardle*, 1889, 58 L.J. Q.B. 377.

[9] See Palmer's Company Law, 12th ed., p. 260.

[10] Companies (Particulars of Directors) Act, 1917 (7 & 8 Geo. V. c. 28), s. 2 (2).

SECTION 7.—CAPITAL.

SUBSECTION (1).—*In General.*

68. The last statement required to be contained in the memorandum of association is the amount of the capital with which the company proposes to be registered, and the division thereof into shares of a fixed amount. Nothing more need be stated under this clause. It is common but unnecessary to add powers to increase capital, to divide it into shares of larger or smaller amount, to convert paid-up shares into stock, and to reduce capital. The Act contemplates that these matters be dealt with in the articles (ss. 41 and 46), and the only other permissible alteration of the capital conditions of the memorandum, namely, reorganisation, is provided for in the Act (s. 45). Any further conditions inserted in the memorandum affecting rights in capital, such as the attachment of preferences or other special rights to particular classes of shares, may be unalterable if inserted without qualification, and unless it be intended to protect them against alteration they should find their place in the articles of association.[1] Where both memorandum and articles are silent as to preference or other special rights being attachable to shares of capital the articles may be altered by special resolution so as to give the power.[2]

69. "Share capital" is primarily used in the sense of the nominal amount of the capital forming the aggregate represented by the total number of shares contemplated as issuable; and in this sense capital may be wholly or partially (*a*) issued, (*b*) subscribed, and (*c*) paid up. Debentures do not form part of the capital in this sense.[3] Fixed capital, meaning money sunk once for all in the acquisition of assets, is to be distinguished from "floating" or "circulating" capital, meaning trading capital subject to fluctuation represented by, *e.g.*, stock sold and replaced. The distinction is important in any question as to the incidence of loss, whether it should form a charge against capital or revenue.[4] "Capital" may also be used to refer to the whole assets of the company as opposed to its liabilities.

70. In the case of an unlimited company or a company limited by guarantee, the articles, if the company has a share capital (see s. 21(2)), must state the amount of share capital with which the company proposes to be registered (s. 10 (3)). An unlimited company formed and registered under the Joint Stock Companies Acts may by special resolution alter its regulations relating to the amount of capital or its distribution into shares, notwithstanding that these regulations are contained in the memorandum (s. 13 (2)).

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[1] See *Ashbury* v. *Watson*, 1885, 30 Ch. D. 376.

[2] *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361; *Liqr. of the Humboldt Redwood Co.* v. *Coats*, 1908 S.C. 751. In this matter *Milford Haven Fishing Co.* v. *Jones*, 1895, 22 R. 577, and *Waverley Hydropathic Co.* v. *Barrowman*, 1895, 23 R. 136, should not be followed.

[3] *Swedish Match Co.* v. *Seivright*, 1889, 16 R. 989.

[4] See *City Property Investment Trust Corporation* v. *Thorburn*, 1897, 25 R. 361.

71. In the case of a company limited by guarantee, the moneys which are payable only on a winding-up form a statutory fund which only comes into existence when the company is in liquidation.[1] The fund is never under the control of the directors while the company is a going concern, and cannot be hypothecated by them in favour of a particular creditor for the purpose of meeting its immediate necessities.[2]

72. Every company must keep a register of members with a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member (s. 25 (1)). Failure to comply with this direction involves penalties (s. 25 (2)). A statement of the capital of the company is required to be made in the statutory report (s. 65) and the annual summary (s. 26).

An *ad valorem* stamp duty of one pound per hundred pounds or any fraction thereof over one hundred pounds is chargeable on the statement delivered to the Registrar of the amount forming the nominal share capital of any company registered with limited liability,[3] and also on any increase of capital.[4] In the case of an unlimited company or a company limited by guarantee, if the company has not a share capital, the articles must state the number of members with which the company proposes to be registered for the purpose of enabling the Registrar to determine the fees payable on registration (s. 10 (4)).

SUBSECTION (2).—*Underwriting and Brokerage.*

73. Promoters of companies do not always trust to a prospectus to get the capital they want. To guard against the contingency of failure, the company's capital is often underwritten in whole or in part before issue. The underwriting of shares is a form of insurance, and reasonable commission paid to underwriters, if disclosed to the members or prospective members, is a legitimate application of the funds of a company.

74. Since the Act of 1900 (s. 8) [5] it has been permissible to a company to pay underwriting commission. The conditions and restrictions subject to which this may be done are now contained in s. 89 of the Act. Under the provisions of the Act it is lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares of the company, if the payment of the commission is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised,[1] and if the amount or rate per cent. of the commission paid or agreed to be paid is (*a*) in the case of shares offered to the public [2] for subscription, disclosed in the prospectus, or (*b*) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus and filed with the Registrar of Companies, and, where a circular or notice, not being a prospectus, inviting subscriptions for the shares is issued, also disclosed in that circular or notice. Save as above, no company may apply any of its shares or capital money, *i.e.* shares before issue or money derived from the issue of its shares,[3] either directly or indirectly in payment of any commission, discount or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares of the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise (s. 89 (2)). It is accordingly now permissible to pay underwriting commission by issuing shares to underwriters at a discount. It is legitimate to remunerate underwriters by giving them "option rights" over shares at par or a premium.[4] The payment of underwriting commission out of profits is not struck at by the Act. A private company may, since the Act of 1907 (s. 8),[5] pay underwriting commissions, and a statement in prescribed form must be filed (before payment is made) for the purpose of disclosing the amount or rate of commission.[6] The commission paid by a company should be a reasonable one. When a high rate of commission has to be paid to underwriters it should be paid, if at all, by the promoter-vendor.

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[1] Per Lindley L.J. in *In re Pyle Works*, 1890, 44 Ch. D. 534.

[2] *Robertson* v. *British Linen Co.*, 1891, 18 R. 1225, where the company hypothecated to lenders to the company the guarantee obligation in pursuance of provision in the memorandum and articles enabling it to do so. The hypothecation was held inept.

[3] Stamp Act, 1891, s. 12; Finance Act, 1899, s. 7; Finance Act, 1920, s. 39; Finance Act, 1921, s. 59.

[4] As to fees payable to the Registrar of Companies, see Table B in Schedule I. of the Act of 1908.

[5] See *Klenck* v. *East India Co. for Exploration and Mining, Ltd.*, 1888, 16 R. 271.

75. The form which the underwriting agreement usually takes is that of a letter addressed by the underwriter to the promoter, undertaking—that is, offering to undertake—for a commission, to subscribe, or find responsible subscribers for a specified number of shares, the underwriter's liability to be reduced rateably in the proportion in which the shares are subscribed for by the public, and authorising the promoter, in the event of the underwriter not subscribing or finding responsible subscribers, to send in on the underwriter's behalf, an application for the proper amount of shares which the underwriter is in that event bound to take.[1]

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[1] *Booth* v. *New Africander Gold Mining Co.*, [1903] 1 Ch. 293.

[2] As to what constitutes an offer to the public, see *Burrows* v. *Matabele Gold Reefs*, [1901] 2 Ch. 23; *Booth* v. *New Africander Gold Mining Co.*, [1903] 1 Ch. 293; *Sleigh* v. *Glasgow and Transvaal Options*, 1904, 6 F. 420; *Sherwell* v. *Combined Incandescent Mantles Syndicate*, 23 T.L.R. 482; *South of England Natural Gas, etc., Co.*, [1911] 1 Ch. 573.

[3] See Lord Davey in *Hilder* v. *Dexter*, [1902] A.C. 474.

[4] *Hilder* v. *Dexter, supra.*

[5] Sec. 89; *Dominion of Canada General Trading and Investment Syndicate* v. *Brigstocke*, [1911] 2 K.B. 648.

[6] For particulars of statement see Form 58 annexed to Order of Board of Trade of 29th March 1909.

76. An underwriting offer, like any other offer, must be accepted, and on acceptance the contract is completed in law.[2] Acceptance may be in writing or oral.[3] Notice of acceptance given after the list of subscribers is closed may bind the underwriter.[4] If conditional in its terms, the offer is not binding until the condition is fulfilled.[5] The underwriter may be barred from denying the authority of the promoter to apply for shares on his behalf where, for example, the conditions attached to the offer are contained in a separate and private letter and do not appear *ex facie* of the offer itself.[6]

77. The executors of a deceased underwriter have been held in England to be liable in an underwriting contract.[7] An underwriter taking shares on the faith of statements in a prospectus which are untrue may repudiate the contract.[8] The company may sue the underwriter for specific performance of the contract, where debentures or debenture stock are being underwritten (s. 105).

78. Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state the amount, if any, paid within the two preceding years or payable as underwriting commission, but it is not necessary to state the commission payable to sub-underwriters (s. 81).

The annual summary must state the total amount of the sums paid by way of commission in respect of any shares or debentures or allowed by way of discount in respect of any debentures since the date of the last return (s. 26). Further, sums paid by way of commission and discount must be stated in every balance-sheet of the company until the whole amount has been written off (s. 90).

79. It is *intra vires* of a company to pay to a broker a reasonable brokerage for placing shares.[9] Formerly it was held otherwise.[10]

SUBSECTION (3).—*Increase of Capital.*

80. A company limited by shares may, if so authorised by its articles, increase its share capital by the issue of new shares of such amount as it thinks expedient (s. 41 (*a*)). A company limited by guarantee and with a share capital and registered after 31st December 1900 may, provided its articles so authorise, increase its share capital in the same way as a company limited by shares (s. 56). The articles may confer power to increase the capital by special resolution, extraordinary resolution, or ordinary resolution of the company, or in any other manner,[1] *e.g.* by resolution of the directors, with or without the sanction of the company obtained by special, extraordinary, or ordinary resolution.[2] Article 41 of Table A propones an extraordinary resolution of the company for the exercise of the power by the directors.[2] Where the power is to increase by resolution of a general meeting, the notice convening the meeting should specify the amount of the proposed increase.[3] The power to increase does not import the power to issue. If the articles do not authorise the company to increase the capital, the articles must be altered by special resolution so as to confer the power.[1] A special resolution so passed authorising the creation and issue of the desired new shares will enable the directors to exercise the authority, if they have power under the articles to act generally on the company's behalf, *e.g.* Article 71 of Table A.[4]

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[1] See *Pole's* case, [1920] 2 Ch. 341.

[2] *Re Consort Deep, etc., Co.*, [1897] 1 Ch. (C.A.) 575.

[3] *North Charterland, etc., Co.* v. *Riordan*, 1896, 13 T.L.R. 80.

[4] *Hemp, Yarn, and Cordage Co.*, [1896] 2 Ch. (C.A.) 121.

[5] *Harvey's Oyster Co.* (*Ormerod's* case), [1894] 2 Ch. 474; *Brussel's Theatre of Varieties, Ltd.* v. *Prockter*, 1893, 10 T.L.R. 72.

[6] *Ex parte Harrison*, 1894, 69 L.T. 204; *In re Consort Deep Level Gold Mines, Ltd.* [1897] 1 Ch. 575; cf. *Premier Briquette Co.* v. *Gray*, 1922 S.C. 329—a case of a sub-underwriter.

[7] *Ex parte Pathé Frères*, [1914] 2 K.B. 299.

[8] *Karberg's* case, [1892] 3 Ch. 1 (C.A.).

[9] *Metropolitan Coal, etc., Association* v. *Scrymgeour*, [1895] 2 Q.B. 604.

[10] *In re Faure Electric Accumulator Co.*, 1889, 40 Ch. D. 141.

81. Upon any increase of share capital beyond the registered capital, the company must give notice thereof to the Registrar within fifteen days of the date of the resolution (s. 44 (1)). Failure to comply with the requirements of this section renders the company and the directors or managers liable to a penalty of £5 per day during the period of default (s. 44 (2)). In the case of a special resolution the date is that of the confirming of the special resolution (s. 44 (1)). Stamp duty will be payable concurrently with the filing of the resolution. In default of delivery of the statement to the Registrar, duly stamped, within fifteen days, interest is chargeable on the duty at 5 per cent. from the passing of the resolution. The *ad valorem* stamp duty is at the rate of 20s. per £100.[5] Where it is left to the directors by the sanction of the company in general meeting (*e.g.* per Art. 41 of Table A) to increase the capital by a specified amount either by a single resolution or by resolutions from time to time of the Board, the capital stamp duty upon "registered capital" (under s. 112 of the Stamp Act, 1891) is exacted by the Inland Revenue on the total amount of the increase of the capital at the time the authority is given, and not at the time or times when the directors actually increase the capital and create the shares under the authority conferred upon them.[6]

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[1] *Campbell's* case, 1873, L.R. 9 Ch. 1.

[2] *Koffyfontein Mines* v. *Moseley*, [1911] A.C. 409.

[3] *MacConnell* v. *E. Prill & Co., Ltd.*, [1916] 2 Ch. 57.

[4] *Campbell's* case, *supra*, at p. 21.

[5] Finance Act, 1920, s. 39. Table B of the First Schedule to the Act of 1908 gives the registration fees payable in respect of increased capital.

[6] *Attorney-General* v. *Anglo-Argentine Tramways*, [1909] 1 K.B. 677; *Attorney-General* v. *Caledonian Rly. Co.*, 1911, 27 T.L.R. 559; Palmer's Company Precedents, 12th ed., p. 471.

82. An unlimited company with a share capital may, by its resolution for registration as a limited company, increase the nominal amount of such capital solely for the creation of a reserve liability in the event and for the purposes of winding up (s. 58); such a company may, in addition or in its option as an alternative under s. 58, provide that a specified part of its uncalled share capital shall be earmarked for winding-up purposes only. The capital is increased under this section by enlarging the nominal amount of each share, and not by creating new shares.

SUBSECTION (4).—*Consolidation and Division of Capital.*

83. A company limited by shares, if so authorised by its articles, may consolidate and divide its share capital or any part thereof into shares of larger amount (s. 41 (1) (*b*), Table A, Art. 44). The capital cannot be increased by any such operation.[1] The process of consolidation of shares and their division into shares of larger amount is not commonly resorted to. The tendency is rather to reduce the denomination of shares. So long as this alteration of the share capital is authorised by the articles, or power is obtained for it by altering the articles, the alteration can be effected by any kind of resolution of the company or of the directors, either with or without the sanction of the company, according as the articles prescribe. The section recognises the validity of a partial consolidation of shares as distinguished from the consolidation of capital.[2]

84. Notice of any consolidation and division, specifying the consolidated and divided shares, must be given to the Registrar (s. 42). No period is specified. But where such operations are effected by extraordinary or special resolution, a printed copy of the resolution must be filed within fifteen days of its date (s. 70 (1)). The Board of Trade act upon the view that an unlimited company with a share capital cannot pursue this method of consolidation and division, and the Registrar is instructed in the case of an unlimited company to refuse articles of association purporting to confer this power.[3]

SUBSECTION (5).—*Subdivision of Shares.*[4]

85. A company limited by shares, if so authorised by its articles, may subdivide all or any of its shares into shares of smaller amount (s. 41 (1) (*d*).[5] The articles must confer power for the operation, but the power can be exercised by special resolution only (s. 41 (2)). If the articles do not contain the power, they must be amended by special resolution, and thereafter the special resolution in exercise of the power be passed.[1] Subdivision may be effected concurrently with prior consolidation by one and the same resolution, which, as it involves subdivision, must be a special resolution. Where consolidation is only a step to subdivision, and fractions are avoided in the complete operation, no objection to this course can be taken.[2] In the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share must be the same as it was in the case of the share from which the subdivided share was derived (s. 41 (1) (*d*); see Art. 44 of Table A). The incidence of unpaid liability on the subdivided shares can be removed as part of a scheme for reorganisation (under s. 45), or for reduction (under s. 46).[3] The articles may contain a power on subdivision to attach a preference to certain of the shares resulting from the subdivision as against the others.[4] A printed copy of the resolution when passed must be sent to the Registrar (s. 70).

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[1] See Wilton's Company Forms, p. 89.

[2] Article 44 of Table A would appear to require modification before partial consolidation could be effected under it, as it relates to share capital as a whole.

[3] See Gore Browne's Company Precedents, 4th ed., 1913, pp. 262 and 614. For considerations against this view see Wilton on Alteration of the Memorandum of Association, p. 53.

[4] For the history of this provision see Wilton on Alteration of the Memorandum of Association, p. 56.

[5] As to an unlimited company, see s. 13 (2).

SUBSECTION (6).—*Conversion of Shares into Stock, and Reconversion.*

86. A company limited by shares, if so authorised by its articles, may convert all or any of its paid-up shares into stock,[5] and may convert stock into paid-up shares of any denomination (41 (1) (*c*)). These alterations of the memorandum capital clause may be effected in the same way as explained in regard to the increase or consolidation and division of capital (see Art. 31 of Table A). Shares converted must be fully paid. No stock can be created by the direct issue of a certificate therefor against the receipt of the full nominal amount in cash. Shares must be issued.[6] Notice of the conversion must be given to the Registrar, specifying the shares converted (s. 42).

Upon conversion of shares into stock and notice thereof to the Registrar, all provisions of the Act referable only to shares cease to apply to the converted portion of the capital (s. 43). The register of members of the company and the list of members forwarded to the Registrar yearly in terms of the Act (s. 26) must shew the amount of stock held by each member (s. 43).

87. Reconversion of stock into shares may be effected in the same way as conversion of shares into stock. The words "any denomination" in the section enable the processes of conversion and reconversion to be used for the purpose of changing the denomination of the share capital.[1] Notice of reconversion must be given to the Registrar, specifying the stock reconverted (s. 42)

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[1] *In re West India and Pacific Steamship Co.*, 1868, L.R. 9 Ch. 11 n.; *In re Patent Invert Sugar Co.*, 1885, 31 Ch. D. 166.

[2] *In re North Cheshire Brewery Co.*, [1920] W.N. 149.

[3] *In re Vine and General Rubber Trust*, 1913, 108 L.T. 709; *In re Doloswella Rubber and Tea Estates*, [1917] 1 Ch. 213.

[4] *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361.

[5] Sec. 41 (1) (*c*); as to the powers of an unlimited company in this matter, see Consolidation and Division of Capital, *supra*, subsec. (4).

[6] *Home and Foreign Investment and Agency Co.*, [1912] 1 Ch. 72.

SUBSECTION (7).—*Cancellation of Unissued Shares.*

88. A company limited by shares may, if so authorised by its articles, cancel unissued shares (s. 41 (1) (*e*), Table A, Art. 44).[2] The company, by any kind of resolution, or the directors with or without the sanction of the company in general meeting, according as the articles prescribe, may cancel shares not taken or agreed to be taken by any person at the date of the resolution of the company or the Board and thus diminish the amount of its share capital by the amount of the cancelled shares. This is not deemed to be a reduction of capital. Neither the existing shareholders nor creditors are prejudiced. Notice of cancellation is not directed to be made to the Registrar. But if effected by extraordinary or special resolution, the resolution must be filed under penalty for default (s. 70).

SUBSECTION (8).—*Reorganisation of Capital.*

89. A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes (s. 45 (1)). Where the reorganisation does not involve an alteration of the memorandum of association, it may be done in the manner provided in the articles without an order of Court.[3] Where an alteration of the memorandum is involved in reorganisation, but not a consolidation of shares of different classes or a division of shares into different classes, s. 45 does not apply,[4] and the alteration may be effected by a scheme of arrangement under s. 120,[5] or under s. 45.[6]

90. In cases to which s. 45 applies it is provided in a proviso to the section that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution. This proviso is not intended to be an independent enactment and operates only in the case of the adoption of both or either of the methods of reorganisation sanctioned by s. 45, and only where the reorganisation interferes with memorandum rights of an absolute nature.[1] The proviso and its procedure apply in the case of a private company.[2] Proxies are competent.[3] Consolidation and subdivision may be carried out by one resolution.[4] It is competent to cast the whole or an unequal portion of any uncalled liability on one class only of the shares divided into different classes under s. 45.[5] Preferential shares may be accorded additional rights at the expense of the ordinary shares without bringing into operation the proviso to s. 45.[6] Certain Scottish decisions are of doubtful validity.[7] The operations authorised by s. 45 have been successfully effected under the provisions of s. 41 (*d*) by conversion of shares into stock and reconversion.[8]

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[1] See *Texas Land and Cattle Co.*, 1894, 2 S.L.T. 118, for a case of conversion of one class of shares into another class apparently not justified by any express provision in the Act.

[2] As to an unlimited company, see s. 13 (2).

[3] *Re Australian Estates and Mortgage Co.*, [1910] 1 Ch. 414.

[4] *Re Schweppes, Ltd.*, [1914] 1 Ch. 322, following *Re Palace Hotel, Ltd.*, [1912] 2 Ch. 438, and overruling *Re Doecham Gloves, Ltd.*, [1913] 1 Ch. 226.

[5] *Re Palace Hotel, Ltd., supra*; *Re J. A. Nordberg, Ltd.*, [1915] 2 Ch. 439.

[6] *Re Garden Village (Hull), Ltd.*, [1923] 1 Ch. 230, where dividend rights fixed by the memorandum were altered by a process of subdivision.

91. The Court directs a copy of the confirmation deliverance to be filed with the Registrar. The copy should be filed with him within seven days of the date of the interlocutor (s. 45 (2)). Until filed, the resolution does not take effect (s. 45 (2)). The Court also directs notification in the *Gazette* of the registration of the order with the Registrar.[9] No other advertisement of the presentation or dependence of an application under section 45 is required.[10]

Subsection (9).—*Reduction of Capital.*

(i) *In General.*

92. The Act of 1908 confers a perfectly general power of reduction of capital, but this is subject to the sanction of the Court except in the following cases: (1) where the company has power in its articles to forfeit shares on non-payment of calls, and shares with uncalled liability are so forfeited;[11] (2) where paid-up capital is paid off out of accumulated profits (s. 40); and (3) in the case of an unlimited company. It is thought that a company may not without the sanction of the Court accept a surrender of shares, unless as a *bona fide* substitute for forfeiture.[12]

The general principle of the Act is that the capital of a company is not to be reduced without the sanction of the Court, in any case where the rights of creditors are affected. Apart from the ordinary risks of the diminution or loss of capital of the business, persons dealing with the company are entitled to rely on the capital remaining undiminished by any expenditure outside those limits, or by the return of any part of it to the shareholders.[1]

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[1] *Re Schweppes, Ltd.*, [1914] 1 Ch. 322; *Re Palace Hotel, Ltd.*, [1912] 2 Ch. 438; *Re J. A. Nordberg, Ltd.*, [1915] 2 Ch. 439; *Balmenach-Glenlivet Distillery*, 1916 S.C. 639.

[2] *Arden Coal Co.*, 1922 S.C. 500.

[3] *Re Foucar & Co., Ltd.*, 1913, 29 T.L.R. 350.

[4] *Re North Cheshire Brewery*, [1920] W.N. 149.

[5] *In re Vine and General Rubber Trust*, 1913, 108 L.T. 709.

[6] *Stewart Precision Carburettor Co., Ltd.*, 1912, 28 T.L.R. 335.

[7] *Scottish India Rubber Co.*, 1920 S.C. 1; *Peebles Hotel Hydropathic*, 1920 S.C. 303, commented on in Wilton on Alteration of the Memorandum of Association, p. 66.

[8] *E.g., The National Dwellings Society, Ltd.*, 1898, 78 L.T. 144.

[9] *Scottish India Rubber Co.*, 1920 S.C. 1.

[10] *In re Ashanti Development, Ltd.*, 1911, 27 T.L.R. 498; *Robert A. Munro*, 1913 S.C. 456; *British Assets Trust*, 1913 S.C. 661.

[11] See Articles 24 to 30 of Table A.

[12] *Infra*, paras. 97 and 205.

93. Under the Act of 1862, which permitted increase, consolidation and division, and conversion of capital, no reduction was permitted. The Companies Acts, 1867, 1877, and 1880, however, sanctioned reduction of capital in certain cases. The Act of 1877, passed in consequence of the decision in the *Ebbw Vale* case,[2] made legal a reduction of paid-up capital. The decisions in *Poole* v. *National Bank of China*,[3] following upon *British and American Trustee Co.* v. *Couper*,[4] made it clear that the power of reduction conferred by the Acts was perfectly general and not confined to the particular instances specified in the Acts. The only condition precedent to the exercise by the Court of its jurisdiction to sanction a reduction is a special resolution passed pursuant to a provision in the articles (s. 46).

94. A company limited by guarantee and registered on or after 1st January 1901, may, if it has a share capital, and is so authorised by its articles, reduce its share capital in the same manner and subject to the same conditions on and subject to which a company limited by shares may reduce its share capital (s. 56).[5]

(ii) *Without Confirmation by Court.*

(a) *Return of Accumulated Profits.*

95. When a company has accumulated a sum of undivided profits, which, with the sanction of the shareholders, may be distributed in the form of dividend or bonus, it may, by special resolution, return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount (s. 40 (1)). The result of a return will be to transfer the amount returned from revenue to capital account.[6] The special resolution must deal with an existing accumulation of undivided profits.[7] The return may be, as where some of the shares are fully paid and some partly paid, to some of the shareholders only.[8] It is not necessary for the exercise of the power that it should be expressed in the articles of the company. Before the resolution can take effect a memorandum shewing the particulars required by the Act in the case of a reduction of share capital must be produced to and registered by the Registrar of Companies (ss. 40 (2), 51).

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[1] *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409.

[2] *Ebbw Vale Steel, Iron, and Coal Co.*, 1877, 4 Ch. D. 827.

[3] [1907] A.C. 229.

[4] [1894] A.C. 399.

[5] As to an unlimited company, see s. 13 (2).

[6] *Re Piercy*, [1907] 1 Ch. 289; *Commissioners of Inland Revenue* v. *Blott*, [1921] A.C. 171; for a full discussion of the effect of s. 40 see Buckley on the Companies Acts, 10th ed., p. 125 *et seq.*

[7] *Re Piercy, supra.*

[8] *Neale* v. *City of Birmingham Tramways Co.*, [1910] 2 Ch. 464.

96. A shareholder affected by the resolution to return may require the company to retain the money instead of paying it over to him, and the company must invest the money so retained and pay the interest to the shareholder (s. 40 (3)). The money so retained is to be held to represent future calls (s. 40 (4)). The annual summary must contain the amounts retained, and the company's accounts as put before a general meeting of the company must shew the amount of undivided profit retained (s. 40 (6)).

(b) *Forfeiture and Surrender of Shares.*[1]

97. Forfeiture of shares is contemplated by the Act (s. 26 and Table A, Arts. 24–30) on account of non-payment of calls, and is a proceeding at the option of the company and *in invitum.* It puts the company in a position to place the shares in other hands and so to obtain payment of the balance of capital outstanding. There is no reference to surrender of shares in the Act, but it is admitted by the Courts as having the same effect as forfeiture in the case of impecunious shareholders, the shareholders, however, being assenting parties.[2] Its validity without the sanction of the Court, except as a substitute for forfeiture, is doubtful.[3] Power to forfeit or to accept surrender of shares must be contained in the articles.[4]

(c) *Unlimited Company.*

98. An unlimited company can reduce its share capital in any manner prescribed in its constitution. Thus, it may provide by its memorandum and articles for a return of capital to its members or for the withdrawal of members from the company.[5] Confirmation of the reduction by the Court is not required. The share capital of an unlimited company ought not to be stated in its memorandum. If it is stated, the company has implied power to alter the memorandum in this respect (s. 13 (2)).

(iii) *With Confirmation by Court.*

(a) *In General.*

99. Subject to confirmation by the Court, a company limited by shares, if so authorised by its articles (see Table A, Art. 44) may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may (*a*) extinguish or reduce the liability on any of its shares in respect of share capital not paid up, or (*b*) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets, or (*c*) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company, and may, if and so far as necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly (s. 46 (1)).

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[1] See also para. 201 *et seq.*

[2] Per Lord Watson in *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409; *Bellerby* v. *Rowland & Marwood's Steamship Co.*, [1902] 2 Ch. 14; *General Property Investment Co.* v. *Craig*, 1891, 18 R. 389; *Arizona Copper Co.*, 1900, 2 F. 843.

[3] See Palmer's Company Law, 12th ed., p. 95; *Trevor* v. *Whitworth*, *supra*, per Lord Macnaghten at p. 438; *British and American Trustee Co.* v. *Couper*, [1894] A.C. 399; *Bellerby*, *supra*; *Rowell* v. *John Rowell & Sons, Ltd.*, [1912] 2 Ch. 609.

[4] *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656.

[5] *E.g. In re Borough Commercial and Building Society*, [1893] 2 Ch. 242.

100. The power to reduce must be contained in the articles. It is not sufficient that it be contained in the memorandum.[1] The articles may be amended by special resolution so as to confer the power before the resolution for reduction is initiated. The two resolutions cannot be passed *simul ac semel*.[2] The Courts in Scotland, where such a procedure has been followed, will continue the petition for confirmation to allow the company to hold meetings of new.[3] By proper notice the resolutions may be passed in three meetings.[4] Shareholders are not entitled to full or any explanations by the board of directors of any special resolution for reduction, but it is often convenient to accompany the formal notice with an explanatory memorandum.[5]

101. There is no limit to the ways in which a company may reduce its share capital so long as the reduction complies with the statutory provisions and provided that the creditors, where their interests are affected, are protected. The Court may confirm "any resolution, however much against any provision of the company it may be, provided always, of course, that that resolution is really for a reduction of capital, and subject also to this very great safeguard that the Court is not to do so unless it thinks that on the whole the new arrangement is a just and equitable arrangement."[6] Thus a company may reduce its share capital by way of return of paid-up capital in excess of its wants, and that with a view to borrowing immediately a similar amount on debenture.[7] Where the reduction does not involve the diminution of any liability in respect of unpaid capital or the payment to any shareholder of paid-up capital, and where creditors are not concerned, the only questions for consideration are (1) Ought the Court to refuse its sanction to the reduction out of regard to the interests of those members of the public who may be induced to take shares? and (2) Is the reduction fair and equitable as between the different classes of shareholders?[1]

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[1] *John Avery & Co., Ltd.*, 1890, 17 R. 1101; *In re Dexine Patent Packing and Rubber Co.*, [1903] W.N. 82.

[2] *Oregon Mortgage Co.*, 1910, S.C. 964.

[3] *Oregon Mortgage Co., supra.*

[4] *Re John Crossley & Sons*, [1892] W.N. 55.

[5] *Quebrada Railway Land and Copper Co.*, 1889, 40 Ch. D. 363, is not followed in practice.

[6] Per Lord Pres. Dunedin in *Balmenach-Glenlivet Distillery, Ltd.* v. *Croall*, 1906, 8 F. 1135, at p. 1141.

[7] *In re Nixon's Navigation Co.*, [1897] 1 Ch. 872; *In re Thomas de la Rue & Co.*, [1911] 2 Ch. 361.

102. The following points decided or arising in reduction confirmation applications may be noted. It is not necessarily a reduction of capital requiring sanction of the Court to write off losses incurred in previous years against capital, and in any subsequent year to pay dividends out of surplus receipts for that year without making up the capital account;[2] Lord Davey, in the case cited, dissented from this view, and approved the statement of the law by Lord Lindley, in *Verner* v. *General and Commercial Investment Trust*,[3] to the effect that fixed capital may be sunk or lost, and yet the excess of current receipts over current payments may be divided, but floating or circulating capital must be kept up, otherwise it would enter into and form part of such excess.[4] Mere substitution of one class of shares for another with the same liabilities, if any, for unpaid capital does not operate as a reduction under the statute.[5] It is illegitimate under the guise of a scheme of reduction to increase the capital of a company, *e.g.* to raise new capital in place of capital which has disappeared,[6] or to increase capital by the issue of new shares to the holders of cancelled shares without any further payment or consideration to the company,[7] or to seek reconstruction of the company on a basis essentially different from that on which it was constituted.[8] Reduction cannot be effected by a re-allocation of capital which leaves the nominal capital where it was before.[9] The competency of a reduction scheme, the effect of which is not to reduce share capital in fact, but merely to extinguish liability on shares so that they may be surrendered, as in one case "when required" for reissue, leaving the nominal capital the same, may be doubted.[10] In a reduction resolution the whole share capital must be dealt with.[11]

103. Capital may be reduced by returning so much to the shareholders "upon the footing that the amounts returned or any part thereof may be called up again."[12] The proper procedure where any share capital is repaid is to make the actual return after the minute of the reduced capital is registered under the direction of the Court in the confirmation order, when the special resolution becomes operative (s. 15 (2)). The practice in England has varied.[13] The Court in special circumstances[1] has ratified the return of capital without the company previously obtaining its authority to a reduction. A company may purchase its own shares subject to confirmation by the Court of the reduction so effected, but not otherwise.[2] If the price is paid out of profits, creditors are not affected.[3] Forfeited shares on which moneys have been paid to the company can be treated under a reduction of share capital as unissued,[4] and as part paid or with nothing paid thereon.[5] Reduction may form part of a scheme of arrangement in connection with the resuscitation of a company in liquidation prior to formal stay of proceedings therein.[6]

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[1] Per Lord Macnaghten in *Poole* v. *National Bank of China*, [1907] A.C. 229; *Caldwell* v. *Caldwell (Paper-makers), Ltd.*, 1916 S.C. (H.L.) 120.

[2] *Dovey* v. *Cory*, [1901] A.C. 477.

[3] [1894] 2 Ch. 239.

[4] See also *Bond* v. *Barrow Hœmatite Steel Co.*, [1902] 1 Ch. 353.

[5] *Rowell* v. *John Rowell & Sons*, [1912] 2 Ch. 609.

[6] *W. Morrison & Co.*, 1892, 19 R. 1049.

[7] *In re Development Company of Central West Africa*, [1902] 1 Ch. 547.

[8] *City Property Investment Trust*, 1896, 23 R. 400.

[9] *Walker Steam Trawl Fishing Co.*, 1908 S.C. 123; but see *In re Doloswella Rubber and Tea Estates Co.*, [1917] 1 Ch. 213—a decision of doubtful validity.

[10] But see Stiebel's Company Law and Precedents, 1920, 2nd ed., p. 744; *Doloswella Rubber and Tea Estates Co.*, *supra*; *In re Denver Hotel Co.*, [1893] 1 Ch. 495.

[11] *Scottish Manitoba and North-West Real Estate Co., Ltd.*, 1892, 20 R. 31.

[12] *Scottish Vulcanite Co.*, 1894, 21 R. 752.

[13] The precedent in *Lees Brook Spinning Co.*, [1906] 2 Ch. 394, not following *Calgary and Edmonton Land Co.*, [1906] 1 Ch. 141, conforms to the statute.

104. In the event of opposition the Court decides whether the method of reduction proposed is fair and equitable as between shareholders. The inference to be drawn from the fact that the Act is silent as to the manner in which, in case of reduction, loss is to be borne, or money to be returned as among the several shareholders, is that, if it be loss, it is to be borne among them in such manner as under the company's constitution loss in respect of capital is to be borne; and, if it be money to be returned, it is in like manner to be returned as capital is returnable.[7] If there be two classes of shares, without preference as to capital, but one of which has preferential rights as to dividend, the Court will not sanction a reduction in respect of loss which reduces the ordinary shares without reducing the preference shares.[8] But if all the shares be rateably reduced, although thereby the preference shares suffer a diminution of dividend, the reduction will be sanctioned.[9] Even where the above conditions exist, if there be proper consents under the articles,[10] or special circumstances,[11] and the operation of the fair and equitable rule, or an arrangement under s. 120, the Court may confirm a reduction. It may impose conditions, as by requiring that the articles be altered so that the class of shares reduced be reduced in voting power.[12]

105. A company can reduce its capital by paying off some of its shareholders without all the shareholders of one class being equally dealt with,[1] and in so doing may employ the fund set free by the reduction in the purchase of the shares which it is intended to extinguish.[2] The incidence of the reduction may be unequal as among the several classes of shareholders.[3] The Court may intervene to protect the interests of ordinary shareholders as against preference shareholders, so that in the particular circumstances the incidence of the reduction is fair and in the true interests of all the shareholders.[4] Where the requirements of the articles of association have not been complied with, or where at the confirmation meeting a quorum of members was not present,[5] or the resolution has not been passed by the requisite majorities,[6] the Court will not confirm the reduction and may refuse the petition.

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[1] *Scottish Queensland Mortgage Co.*, 1908, 46 S.L.R. 22.

[2] *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409; *General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282; cf. *Klenck* v. *East India Company for Exploration and Mining, Ltd.*, 1888, 16 R. 271.

[3] *In re Dicido Pier Co.*, [1891] 2 Ch. 354.

[4] *Thomas Wolf & Son (1907)*, 1912, 57 S.J. 146.

[5] *In re Victoria (Malaya) Rubber Estates, Ltd.*, [1914] W.N. 307, and see *Doloswella Rubber and Tea Estates Co.*, [1917] 1 Ch. 213.

[6] See Palmer's Company Precedents, 12th ed., 1922, p. 1207; *George Anderson (Monifieth)*, 1915, (n.r.); Wilton's Company Liquidation, pp. 177, 233, and 269.

[7] *London and New York Investment Corporation*, [1895] 2 Ch. 860, 867; *Floating Dock Co. of St Thomas, Ltd.*, [1895] 1 Ch. 691; Buckley on the Companies Acts, 1924, 10th ed., p. 136.

[8] *Quebrada Railway Land and Copper Co.*, 1889, 40 Ch. D. 363.

[9] *Mackenzie & Co., Ltd.*, [1916] 2 Ch. 450.

[10] *Welsbach Incandescent Gas Mantle Co.*, [1904] 1 Ch. 87, 93; *The National Dwellings Society, Ltd.*, 1898, 78 L.T. 144; Table A, Art. 4.

[11] *Balmenach-Glenlivet Distillery, Ltd.* v. *Croall*, 1906, 8 F. 1135.

[12] *Pinckney & Sons Steamship Co.*, [1892] 3 Ch. 125; *James Colmer, Ltd.*, [1897] 1 Ch. 524; *Caldwell* v. *Caldwell (Paper-makers), Ltd.*, 1915 S.C. 527; *Balmenach-Glenlivet Distillery, Ltd., supra.*

106. The effect of reduction is that no members of the company, past or present, can be made liable in respect of any share to any call or contribution exceeding its reduced amount (s. 53). This exemption is subject to the proviso that any unpaid creditor, entitled to object to the reduction, who failed to object by reason of his ignorance of the proceedings for reduction or of their nature and effect in relation to his claim, and consequently not entered on the list of creditors, is protected against non-payment of his debt through the insolvency of the company. Every person who was a member of the company at the date of the registration of the order for reduction and the relative minute is liable to contribute to the payment of such creditor's debt to an amount not exceeding his liquidation liability if the company had passed into liquidation on the day prior to such registration. In the case of actual liquidation any such creditor may apply to the Court, subject to proof of his ignorance of the reduction proceedings and of their nature and effect, to settle a list of all persons so liable to contribute, and to make and enforce calls and orders on such settled contributories as if they were contributories in a winding-up, without prejudice to any question as to the rights of such contributories among themselves (s. 53).

(b) *Applications to Court.*

107. As soon as the company has passed and confirmed the special resolution for reduction, it may present a petition for a confirmation order (s. 47). The procedure varies according as creditors are or are not concerned. Where reduction is by way of cancellation of paid-up capital, creditors are not concerned (s. 46 (1) (*b*)). Where, however, the scheme of reduction involves the extinction or reduction of share liability on capital not paid up (s. 46 (1) (*a*)), or repayment of paid-up capital to the members (s. 46 (1) (*c*)), the interests of creditors are affected. Instances of reduction schemes where creditors are not concerned are noted below.[1]

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[1] *British and American Trustee and Finance Co.* v. *Couper*, [1894] A.C. 399; *Credit Assurance and Guarantee Co.*, [1902] 2 Ch. 601.

[2] *Banknock Coal Co., Ltd.*, 1897, 24 R. 476.

[3] *Hoggan* v. *Tharsis Sulphur and Copper Co.*, 1882, 9 R. 1191; see *British and American Trustee and Finance Co.* v. *Couper*, [1894] A.C. 399.

[4] *Balmenach-Glenlivet Distillery, Ltd.* v. *Croall*, 1906, 8 F. 1135.

[5] *Garnock Steamship Co., Ltd.*, 1895, 3 S.L.T. 156.

[6] *J. T. Clark & Co., Ltd.*, 1911 S.C. 243.

(i) *Where Creditors are not Concerned.*

108. Where creditors are not concerned, then on and from the presentation of the petition for confirming the reduction the company must add to its name, until such date as the Court may fix, the words "and reduced" as the last words in its name, but the Court may dispense altogether with the addition of the words (s. 48). The Court of Session in practice dispenses *ad interim* with their use as soon as the first order is moved, and as part of it, and dispenses with their use altogether in the final order. The Court has dispensed with the use of the words *ab ante*, after the confirmation of the special resolution and before the presentation of the petition, on an application made on the ground of prejudice to the company in its business.[2] The Court has dismissed a petition in respect of the inadvertent omission of the words.[3]

109. The Court usually requires advertisement of the dependence of the petition.[4] The Court of Session will not grant *de plano* confirmation of any reduction on the ground that creditors are not affected.[5] Intimation on the walls and in the minute-book is ordered, and advertisement in the *Gazette* and in one or more newspapers circulating within the area in which the company conducts business, and answers are allowed on an *induciæ* of eight days after intimation or the issue of the newspaper containing the last advertisement.

110. Creditors have the right, subject to the leave of the Court, to object to reduction (s. 49).[6] Where creditors are not concerned, a list of creditors need not be settled, unless the Court so directs, and in practice the prayer of the application does not contain a crave for the settlement of such a list. If it does, the Court may insist on the settlement of a list.[7] Shareholders are not precluded from impugning illegal resolutions for reduction.[8] If reduction would interfere with the contractual rights of any members they may object to the company exercising its statutory powers in a way inconsistent with their rights.[9] Any petition dealing with the reduction of share capital of a company with different classes of shares ought to aver the right of any class to priority as regards payment of capital on liquidation.[1] But the Court can sanction any scheme that is fair and equitable.[2]

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[1] *Banknock Coal Co.*, 1897, 24 R. 476; *London and New York Investment Co.*, [1895] 2 Ch. 860; *John Watson, Ltd.*, 1895, 3 S.L.T. 108; *In re Dicido Pier Co.*, [1891] 2 Ch. 354; *Oban and Aultmore Distilleries Co.*, 1903, 5 F. 1140; *Balmenach-Glenlivet Distillery* v. *Croall*, 1906, 8 F. 1135; *Texas Land and Cattle Co.*, 1894, 2 S.L.T. 118; *Caldwell* v. *Caldwell (Paper-makers), Ltd.*, 1916 S.C. (H.L.) 120; 1915 S.C. 527.

[2] *Scottish Power Co.*, 1917 S.C. 123.

[3] *J. T. Clark & Co.*, 1911 S.C. 243.

[4] *In re Tambracherry Estates Co.*, 1885, 29 Ch. D. 683—dispensation refused; *In re Plaskynaston Tube Co.*, 1883, 23 Ch. D. 543—dispensation granted.

[5] But see *British and Burmese Steam Navigation Co.*, 1879, 7 R. 379.

[6] *In re Meux's Brewery Co.*, [1919] 1 Ch. 28.

[7] *Cranston's Tea Rooms, Ltd.*, 1919, 56 S.L.R. 208; 1 S.L.T. 107.

[8] *Tharsis Sulphur and Copper Co.* v. *Hoggan*, 1882, 9 R. 507; see *British and American Trustee and Finance Co.* v. *Couper*, [1894] A.C. 399; *Thomas de la Rue & Co.*, [1911] 2 Ch. 361.

[9] *Gill* v. *Arizona Copper Co.*, 1900, 2 F. 843; *Ashbury* v. *Watson*, 1884, 28 Ch. D. 56; 1885, 30 Ch. D. 376.

111. If no answers are lodged, the Court remits the proceedings to a man of business or reporter to consider the regularity of the procedure adopted by the company and the facts set forth in the petition.[3] Reasons for the reduction need not be assigned. The jurisdiction arises whenever the company seeking reduction has duly passed a special resolution to that effect.[4] But if the petition on the special resolution goes into reasons, then these also become facts for investigation.[5] The Court may direct publication by the company of its reasons for reduction and the causes leading to the reduction,[6] but in Scotland such publication is never required. When loss or excess of capital is averred in the special resolution or in the application for confirmation as the reason for the reduction, it is not the practice in Scotland to take any evidence or proof by witnesses, but the reporter may call for accounts and balance-sheets and report on them to the Court.[7] In England the practice is to lead evidence by affidavit. If answers are lodged, these also are remitted to the reporter. The Court hears parties on his report before either confirming the reduction or dismissing the petition.

(ii) *Where Creditors are Concerned.*

112. Where creditors are concerned, the company must use the words "and reduced" as part of its name from the moment of confirmation of the special resolution for reduction, and see that all onerous documents, such as bills, cheques, receipts, and letters of credit are made out in the altered name. But as in Scotland it is usual to have the petition for confirmation ready to lodge in Court on the day the resolution is confirmed, and the Court, in its first order, dispenses "*in hoc statu*" with the use of the words "and reduced," the use of the words, except in the petition, is avoided, and no risk of any fine imposed by the Act (s. 63) is incurred.

113. The first order is for intimation and advertisement.

On expiry of the *induciæ* the Court is moved to fix the date, usually the date of presentation of the petition, which will regulate the debts or claims of the creditors entitled to object, and also to fix another date within which creditors not entered in the list are to claim to be entered or are to be excluded from the right of objecting to the reduction (s. 49 (1) (2)).[1] It is not usual to treat the claims of the clerical staff and workmen of the company as coming within the purview of the list. The Court orders the dates so fixed to be advertised in the same newspapers as the petition and also in the *Gazette*. It is usual to fix the date by which creditors may object to the proposed reduction at a period ten days after the date fixed for the settlement of the list, or twenty days from the date of the first order.

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[1] *Mackenzie & Co., Ltd.*, [1916] 2 Ch. 450.

[2] *Credit Assurance and Guarantee Corporation, Ltd.*, [1902], 2 Ch. 601; *Gatling Gun, Ltd.*, 1890, 43 Ch. D. 628; *Agricultural Hotel Co.*, [1891] 1 Ch. 396, overruling *Union Plate Glass Co.*, 1889, 42 Ch. D. 513; *Bannatyne* v. *Direct Spanish Telegraph Co.*, 1886, 34 Ch. D. 287.

[3] *Robert Addie & Sons' Colleries*, 1916 S.C. 936.

[4] Per Lord Macnaghten in *National Bank of China* v. *Poole*, [1907] A.C. 229, at p. 239.

[5] *New Zealand and Australian Land Co.*, 1881, 8 R. 691.

[6] Sec. 55; *Truman, Hanbury, Buxton & Co., Ltd.*, [1910] 2 Ch. 498; *Apollinaris and Johannis Co.*, Times, 6th June 1923; Wilton on Alteration of the Memorandum of Association, p. 96.

[7] *Caldwell* v. *Caldwell (Paper-makers), Ltd.*, 1916 S.C. (H.L.) 120; 1915 S.C. 527.

The Court at the same time remits the proceedings to a man of business to inquire into the regularity of the procedure and the facts stated in the petition, and to adjust the list of creditors in order that it may be settled formally by the Court as the statutory list. The list of creditors, prepared by the auditor, secretary, cashier or other responsible official of the company, should not be lodged until the remit is made. The remit should not, it is thought, embrace an inquiry into the reasons for reduction unless in special cases in opposed applications.[2] Where reduction takes the form of return of paid-up capital, it is not necessary that in the resolution the return should purport to be made as being "in excess of the wants of the company." Nor need the application to the Court so state. Any inquiry into this matter is unnecessary, as the interests of creditors are otherwise safeguarded (ss. 49 and 50). If answers are lodged these also are remitted to the reporter, and on his report the Court confirms the reduction or dismisses the petition.

114. Where creditors remain silent or inactive their consent cannot be presumed.[3] Where a creditor entered on the list, and whose debt or claim is not discharged, does not consent to the reduction, the Court can dispense with his consent upon the company securing payment of his debt or claim according as (1) the company admits or is willing to provide for it, (2) the company disputes it or is unwilling to provide for it, or (3) the Court holds it to be contingent or unascertained (s.49). In case (1) the full amount of the debt or claim must be secured. In cases (2) and (3) the Court fixes an amount as if it were adjudicating upon a debt in a winding-up. Where the debt is *solvendum in futuro* it is usual for the Court, following English authorities,[4] to appoint the full amount of the claim to be consigned in Court; and according as the obligation is or is not met at the term, the company or the creditor, as the case may be, may obtain from the Court an order for payment out of the consigned fund. Future rents of property leased by a company are not contingent or unascertained, and full security will be required of the company. This not being provided, the application will be dismissed.[1] Where a company seeking confirmation of a reduction keeps moneys available for unpaid dividends lying in bank in a special dividend account, such appropriation, "having regard to the nature of the debt," will be sufficient to take the members entitled out of the category of creditors whose debts require to be discharged by the company or secured by consignation or otherwise.[2]

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[1] *Robert Addie & Sons' Collieries, Ltd.*, 1916 S.C. 936.

[2] See *The Grianaig Shipping Co., Ltd.*, 1899, 2 F. 344; *George Morton, Ltd.*, 1900, 2 F. 1032; *Robert Addie & Sons' Collieries, Ltd.*, 1916 S.C. 936.

[3] *Tharsis Sulphur and Copper Co.*, 1882, 10 R. 103; *Crédit Foncier of England*, 1871, L.R. 11 Eq. 356; *Patent Ventilating Granary Co.*, 1879, 12 Ch. D. 254.

[4] *Oppenheimer* v. *British and Foreign Exchange and Investment Bank*, 1877, 6 Ch. D. 744; *Robert Addie & Sons' Collieries, Ltd.*, 1916 S.C. 936; Wilton on Alteration of the Memorandum of Association, p. 107.

(c) *The Order Confirming Reduction.*

115. On the Court confirming the reduction resolved upon by the special resolution of the company, it directs a copy of the order and a copy of a minute stating the reduced capital of the company to be filed with the Registrar (s. 51). In Scottish practice the minute takes the form of a simple statement of the capital of the company as reduced (s. 52 (1)), and is substituted for the corresponding part of the memorandum. The Registrar registers the order and minute (s. 51 (1)). On registration the resolution for reduction takes effect (s. 51 (2)). The Registrar issues his certificate of registration, and it is conclusive evidence that all the requirements of the Act have been complied with, and that the capital is as stated in the minute (s. 51 (4)). The certificate bars all objections to the validity of the reduction, *e.g.* that the special resolution has been irregularly passed.[3] Notice of registration must be published and is made by advertisement in the *Gazette* and in the newspapers in which intimation of the presentation of the petition appeared,[4] but has been dispensed with wholly or partly both in England[5] and Scotland.[6] Every copy of the memorandum issued after registration must embody the minute (s. 52 (1)). Default involves liability to fines on the company, and on every director and manager of the company who knowingly and wilfully authorises or permits such default (s. 52 (2)).[7]

SUBSECTION (10).—*Application of Capital.*

116. A company, if so authorised by its articles, may pay out of capital interest on money paid by shareholders to the company in advance of calls,[8] or on share capital paid up during the construction of works (s. 91). But it may not pay dividends out of capital.[9] A company's power to deal with its capital assets is limited by the terms of its memorandum of association.[10] As to disposal of surplus assets, see LIQUIDATION.

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[1] *Palace Billiard Rooms* v. *City Property Investment Co.*, 1912 S.C. 5.

[2] *Arizona Copper Co.*, 1926, S.L.T. 180 ; this accords with English practice.

[3] *Ladies' Dress Association, Ltd.* v. *Pulbrook*, [1900] 2 Q.B. 376 ; *Walker* v. *Smith*, 1903, 72 L.J. Ch. 572.

[4] *The Don Fishing Co.*, 1916 S.C. 543.

[5] *Canada North-Western Land Co.*, 1885, W.N. 61.

[6] *Lewis Island Preserved Specialties Co.*, 10th January 1923 (n.r.).

[7] *Gibson* v. *Barton*, 1875, L.R. 10 Q.B. 329.

[8] See *infra*, para. 161 *et seq.*, Calls.

[9] See *infra*, para. 277 *et seq.*, Dividends and Profits.

[10] See para. 289 *et seq.*, *infra*, Powers of a Company.

SECTION 8.—PROSPECTUS.

SUBSECTION (1).—*Definition.*

117. Where a company is a public company, that is, intends to appeal to the public to subscribe its capital, the first step after registration of the company is to issue a prospectus inviting the public to take shares in the company.

"Prospectus" is defined in the Act to mean any prospectus, notice, circular, advertisement, or other invitation, offering to the public [1] for subscription or purchase any shares or debentures of a company (s. 285). Debenture includes debenture stock.[2]

SUBSECTION (2).—*Filing.*

118. With a view to preserving an authoritative record of the terms on which the public are invited by the company to subscribe for shares or debentures, and to securing that the directors of the company accept responsibility for the statements in the prospectus,[2] it is enacted (s. 80): (1) that every prospectus issued by or on behalf of a company, or in relation to any intended company, shall be dated, and that date shall, unless the contrary be proved, be taken as the date of publication of the prospectus; (2) that a copy of every such prospectus signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised in writing, shall be filed for registration with the Registrar of Companies on or before the date of its publication, and no such prospectus shall be issued until a copy thereof has been so filed for registration; (3) that the Registrar shall not register it unless it be so dated and a copy be so signed: and (4) that every prospectus shall state on the face of it that a copy has been filed for registration under the section of the Act.

Penalties are imposed on the issue of a prospectus without a copy being filed (s. 80 (5)).

SUBSECTION (3).—*Contents.*

119. The prospectus issued to the public is the basis of the contract to take shares.[3] The golden rule for the guidance of those issuing such prospectuses, as stated by Kindersley, V.-C.,[4] and approved by Lord Chelmsford,[5] is: "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, or extent or quality, of the privileges and advantages which the prospectus holds out as inducements to take shares." This rule has been qualified to some extent in subsequent decisions. In an action of rescission directed against the company the Court exacts a higher standard of duty on the part of the defenders than it does in an action of damages against directors or promoters. Mere non-disclosure of material facts will not support an action based on misrepresentation. There must be "some active misstatement of fact, or at all events such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."[1] Even in an action of rescission it has been held that mere non-disclosure of material facts is not enough to entitle a plaintiff to relief.[2] The *suppressio veri* must be such as to falsify the prospectus.[3]

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[1] See cases on offer to the public noted at para. 74, *supra.*

[2] Palmer's Company Law, p. 366.

[3] *Pulsford* v. *Richards*, 1853, 17 Beav. 87.

[4] *Henderson* v. *Lacon*, 1867, L.R. 5 Eq. 249, at p. 262.

[5] *Central Railway Co. of Venezuela* v. *Kisch*, 1867, L.R. 2 H.L. 113.

120. The Act (s. 81) requires that every prospectus except a circular or notice inviting existing members or debenture holders to subscribe for shares or debentures (subsecs. (1) and (7)) issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, shall state:

(*a*) The contents of the memorandum, with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively; and the number of founders' or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and

(*b*) the number of shares, if any, fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors; and

(*c*) the names, descriptions, and addresses of the directors or proposed directors; and

(*d*) the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share; and in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted; and

(*e*) the number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued; and

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[1] Lord Cairns in *Peek* v. *Gurney*, 1873, L.R. 6 H.L. 377, at p. 403; *Arkwright* v. *Newbold*, 1881, 17 Ch. D. 301; *Smith* v. *Chadwick*, 1881, 20 Ch. D. 27.

[2] Per Romer J. in *M'Keown* v. *Boudard Peveril Gear Co.*, 1896, 74 L.T. 310 and (C.A.) 712.

[3] *Aaron's Reefs, Ltd.* v. *Twiss*, [1896] A.C. 273; *Greenwood* v. *Leather Shod Wheel Co.*, [1900] 1 Ch. 421.

(*f*) the names and addresses of the vendors of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and the amount payable in cash, shares, or debentures to the vendor, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor: Provided that where the vendors or any of them are a firm the members of the firm shall not be treated as separate vendors; and

(*g*) the amount (if any) paid or payable as purchase money in cash, shares, or debentures, for any such property as aforesaid, specifying the amount (if any) payable for goodwill; and

(*h*) the amount (if any) paid within the two preceding years, or payable, as commission for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions, for any shares in, or debentures of, the company, or the rate of any such commission: Provided that it shall not be necessary to state the commission payable to sub-underwriters; and

(*i*) the amount or estimated amount of preliminary expenses; and

(*j*) the amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and

(*k*) the dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected: Provided that this requirement shall not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus; and

(*l*) the names and addresses of the auditors (if any) of the company; and

(*m*) full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company; and

(*n*) where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

121. The section does not limit or diminish any liability which any person may incur under the general law or the Act apart from the section (s. 81 (9)). A waiver clause, requiring or binding an applicant for shares or debentures to waive compliance with any requirement of the section or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, would under the Act of 1867, if honestly made,[1] suffice to debar a person taking shares on the faith of the prospectus from his remedy under that Act (s. 38). The Act of 1908 (s. 81 (4)) declares any such condition void.

122. The duty to disclose dates and parties to material contracts was first recognised by the legislature in the Act of 1867 (s. 38; Act of 1908, s. 81 (1) (*k*)). A material contract includes an executed as well as an executory contract,[2] and means every contract which would be likely to influence the judgment of an intending applicant for shares.[3] Notice of the contract, to be effective, must be of the material contents of the contract, not merely of its existence.[4] It is not required that the prospectus should, in the case of a completed purchase, disclose the amount of the purchase money paid by the vendor in acquiring the property.[5]

123. With reference to the requirements of the Act under this section (s. 81) it is further provided that:

Every person shall be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

(*a*) The purchase money is not fully paid at the date of issue of the prospectus; or

(*b*) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or

(*c*) the contract depends for its validity or fulfilment on the result of that issue (subs. (2)).

Where any of the property to be acquired by the company is to be taken on lease, this section shall apply as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee (subs. (3)).

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[1] *Macleay* v. *Tait*, [1906] A.C. 24.

[2] *Broome* v. *Speak*, [1903] 1 Ch. 586.

[3] *Sullivan* v. *Mitcalfe*, 1880, 5 C.P.D. 455; *Cackett* v. *Keswick*, [1902] 2 Ch. 456.

[4] *Watts* v. *Bucknall*, [1903] 1 Ch. 766.

[5] *Brookes* v. *Hansen*, [1906] 2 Ch. 129; see s. 81 (2) (*f*).

Where any such prospectus as is mentioned in this section is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them (subs. (5)).

The requirements of this section as to the memorandum and the qualification, remuneration, and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of preliminary expenses, shall not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business (subs. (8)).

SUBSECTION (4).—*Misrepresentation and Non-disclosure in Prospectus.*

(i) *General.*

124. The allottee of shares, debentures, or debenture stock subscribed for by him on the faith of a prospectus containing a misrepresentation has a threefold remedy: (1) rescission of the contract; (2) as an alternative to rescission, rectification of the register of shareholders; and (3) damages. If necessary for full redress, a shareholder may have both the remedy of rescission against the company and of damages against the person, director or promoter, making the misrepresentation.[1]

(ii) *Action for Rescission.*

125. If a company adopt or approve of a prospectus or other document containing misrepresentations or concealing material facts, the misrepresentation or concealment becomes that of the company, and it cannot retain benefit from a transaction or enforce a contract so induced, but must surrender what is taken under it. The statements in the prospectus are the basis of the contract between the shareholder and the company, and, if they are false, the company cannot enforce the contract.[2] By an action of reduction against the company the person so induced to contract may rescind the contract and demand restitution, tendering restitution in return. A contract to take shares induced by misrepresentation or fraud is not, however, void, but voidable only, at the option of the party defrauded.[3] Reduction on the ground of misrepresentation is not available to signatories of the memorandum, for a representation made when the company did not exist cannot be attributed to the company, and the contract effected by signature followed by registration of the memorandum is a contract to the benefit of which the other subscribers and all other members are entitled.[4]

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[1] Lindley on Companies, 6th ed., p. 91.

[2] *Ranger* v. *Great Western Rly. Co.*, 1854, 5 H.L. c. 86; *Reese River Silver Mining Co.* v. *Smith*, 1869, L.R. 4 H.L. 64; *Central Rly. Co. of Venezeula* v. *Kisch*, 1867, 2 H.L. 99; *Lynde* v. *Anglo-Italian Hemp Spinning Co.*, [1896] 1 Ch. 178.

[3] *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 375.

[4] *In re Metal Constituents, Ltd.* (*Lord Lurgan's* case), [1902] 1 Ch. 707.

126. It is only necessary to prove a material misrepresentation.[1] It makes no difference that the misrepresentation was an innocent one.[2] The misrepresentation must, however, be one of fact,[3] and the shareholder must prove that he took the shares on the faith of it;[4] but it is not necessary that the misrepresentation was the sole inducement,[5] and a *suppressio veri*, if it be a suppression of something which ought to be disclosed, may entitle a shareholder to rescission.[6] But if a prospectus contains statements of fact, the recipient is entitled to act thereon and need not verify them.[7] When there is a breach of the requirements of s. 81 of the Act involving the misstatement of a material fact there is right of rescission, but not where there is merely an omission to state some fact which the section requires to be stated, and the omission does not falsify the prospectus.[8] If a prospectus refers to reports and the company represents as facts matters stated in the reports, and these are false, there is ground for rescission.[9] And where a report made by an agent of the company, *e.g.* a director, is founded on in a prospectus, the company is responsible at all events for seeing that the representations made by the agent are not fraudulent.[10]

127. Persons who buy in the market cannot as a general rule sue on the prospectus;[11] an action will lie, however, if they can shew that the prospectus was intended and used to induce purchasers in the market to buy shares.[12] Misrepresentations made by directors to a general meeting, and afterwards adopted and circulated by the company, will entitle a person who, on the faith of them, buys shares either from a shareholder or from the company, to rescind his contract.[13] It has been held that a misrepresentation as to persons who are to be directors entitles to rescission.[14]

128. If mutual restitution be impossible, this remedy is lost. If the person induced do not within a reasonable time after learning of the misrepresentation challenge the contract, he may be bound by it.

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[1] *Derry* v. *Peek*, 1889, 14 App. Cas. 337, 359.

[2] *Arkwright* v. *Newbold*, 1880, 17 Ch. D. 320.

[3] *Eaglesfield* v. *M. of Londonderry*, 1876, 4 Ch. D. 709.

[4] *Jennings* v. *Broughton*, 1853, 17 Beav. 234.

[5] *Nicol's* case, 1859, 3 De G. & J. 387; *Arnison* v. *Smith*, 1889, 1 Ch. D. 329.

[6] *New Brunswick and Canada Rly. Co.* v. *Conybeare*, 1862, 9 H.L. 724.

[7] *Aaron's Reefs, Ltd.* v. *Twiss*, [1896] A.C. 273, per Lord Watson; *Smith* v. *Chadwick*, 1884, 9 App. Cas. 187.

[8] *Wimbledon Olympia, Ltd.*, [1910] 1 Ch. 630; *South of England Natural Gas, etc., Co.*, [1911] 1 Ch. 573; cf. *Gover's* case, 1875, 1 Ch. D. 182.

[9] *Mair* v. *Rio Grande Rubber Estates*, 1913 S.C. (H.L.) 74.

[10] *Mair, supra.* Lord Shaw there held that *prima facie* the company is responsible also for the truth of the statements of fact contained in the reports.

[11] *Peek* v. *Gurney*, 1873, L.R. 6 H.L. 377.

[12] *Andrews* v. *Mockford*, [1896] 1 Q.B. 372.

[13] *New Brunswick Co.* v. *Conybeare*, 1862, 9 H.L.C. 725; *Nicol's* case, 1859, 3 De G. & J. 387; see, however, *Ex parte Worth*, 1859, 4 Drew. 529.

[14] *In re Scottish Petroleum Co.*, 1883, 23 Ch. D. 413; *Blakiston* v. *London and Scottish Banking and Discount Corporation, Ltd.*, 1894, 21 R. 417; but see *Chambers* v. *Edinburgh and Glasgow Aerated Bread Co., Ltd.*, 1891, 18 R. 1039. For particular cases in England see Palmer's Company Law, pp. 375–377.

Having the means of knowledge has the same effect as the actual knowledge.[1] Further, he may, while ignorant of the misrepresentation and without any fault or delay on his part, lose this remedy by the occurrence of material changes affecting the company.[2] He may, having notice, be held to have elected to affirm the contract, *e.g.* by dealing with the shares.[3] Delay in rescinding is not only evidence of an intention to affirm, but is a bar to rescission also on the principle of holding out, since the presence of the shareholder's name on the register may have induced other persons meanwhile to alter their position.[4] The effect of delay is less in the case of a debenture prospectus, the principle of holding out not being applicable.[5] Nor is it enough for the shareholder to repudiate.[6] He must follow up repudiation by taking steps to have his name removed from the register.[7] Winding-up, or the declared insolvency and stoppage of the company,[8] is a bar to relief, the rights of creditors having intervened.[9] But if the shareholder has commenced proceedings before a winding-up order is made he has a right to have his name removed from the register.[10]

(iii) *Rectification of the Register and Consequent Relief.*

129. The legislature has provided a summary remedy—rectification of the register of members of the company—where the name of any person is, without sufficient cause, entered in the register of members. The person aggrieved or any member of the company or the company may apply to the Court for rectification. The application is made by summary petition to the Court of Session or in such other way as that Court may direct, and the Court may decide any question necessary or expedient to be decided for rectification of the register (s. 32). It is a question of circumstances and discretion whether the Court will permit the adoption of the remedy where the right in dispute may be more appropriately tried in another form of action such as reduction. Where the application is based on misrepresentation in a contract to take shares, it may be refused, an action of reduction being more appropriate.[11]

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[1] *Ashley's* case, 1870, L.R. 9 Eq. 263; *Christeneville Rubber Estates*, [1911] W.N. 26; 81 L.J. Ch. 63.

[2] *Addie* v. *Western Bank*, 1865-1867, 3 M. 899; 5 M. (H.L.) 80; *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 325; *Houldsworth* v. *City of Glasgow Bank*, 1879-80, 6 R. 1164; 7 R. (H.L.) 53; *Stone* v. *City and County Bank*, 1877, 3 C.P.D. 282.

[3] *Clough* v. *London and North-Western Rly. Co.*, 1871, L.R. 7 Ex. 35; *Nicol's* case, *supra*; *Ex parte Briggs*, 1866, L.R. 1 Eq. 483; *Mount Morgan (West) Gold Mines*, 1887, 56 L.T. (N.S.) 622.

[4] Lord Cairns in *Sewell's* case, 1868, L.R. 3 Ch. 138, and in *Lawrence's* case, 1867, L.R. 2 Ch. 417; *Ashley's* case, *supra*.

[5] Palmer's Company Law, p. 384.

[6] *Hare's* case, 1869, 4 Ch. 503.

[7] *Scottish Petroleum Co.*, 1883, 23 Ch. D. 413; cf. *First National Re-assurance Co.* v. *Greenfield*, [1921] 2 K.B. 260.

[8] *Tennent* v. *City of Glasgow Bank*, 1879, 6 R. 554, (H.L.) 69.

[9] *Oakes* v. *Turquand*, *supra*.

[10] *Reese River Silver Mining Co.*, *supra*.

[11] *Sleigh* v. *Glasgow and Transvaal Options, Ltd.*, 1904, 6 F. 420; *Blaikie* v. *Coats*, 1893, 21 R. 150; *Ruby Consolidated Mining Co.*, 1874, 43 L.J. Ch. 633.

Applications based on misrepresentation have been sustained,[1] though not after liquidation has supervened.[2] The Court may sist a summary application until after other proceedings are taken.[3]

130. Petition is not the only competent form of application. Rectification may be ordered in an action of reduction if there be the necessary declaratory and executorial conclusions.[4] It is thought that where reduction proceedings are taken, executorial conclusions are not essential, the decree of reduction being sufficient warrant to the directors to alter the register.

(iv) *Action of Damages.*

131. A shareholder who has been induced to take shares by fraudulent misrepresentation or concealment in the prospectus has, in addition to the remedies of rescission and rectification of the register, the remedy of an action of damages against the directors or promoters, or one or more of them individually. The remedy of damages is not competent against the company.[5] But if necessary for full redress the shareholder may have both the remedy of rescission and the remedy of damages. Or he may keep his shares, and insist in an action of damages against the directors or promoters.[6] Apart from *mora* and acquiescence there is no bar to this action in Scotland except the long negative prescription.

132. The action of damages may be laid at common law, but this is largely superseded by the remedy given by the Directors' Liability Act, 1890, now embodied in the Act of 1908 (s. 84). At common law the pursuer has to prove (1) actual fraud; (2) that the fraud was an inducing cause of his contracting and misled him; and (3) that he suffered loss as a natural consequence.[7] In *Derry* v. *Peek* [8] it was decided that to succeed on the ground of fraud, the plaintiff had to prove the statements were made in the knowledge that they were false or recklessly, not caring whether they were true or false, or not believing them to be true. The difficulties of proof in these matters are great, although grounds of belief may be so slender or flimsy as to destroy the idea of *bona fides*.[9] In consequence of the decision in *Derry* v. *Peek* the Directors' Liability Act of 1890 was passed. The effect of the Act is that the director is, *prima facie*, liable if the allottee prove that a material statement in the prospectus is untrue. To escape liability, the director must prove that he had reasonable grounds to believe the statement to be true, and that he did in fact believe it to be true, or that the statement was made on the authority of an expert, and fairly represented his opinion. The uncorroborated statements of a vendor or vendor-promoter afford no reasonable grounds for believing his statements to be true.[1] In England the executor of a director may be liable for his untrue statements if his estate is increased thereby.[2]

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[1] *Blakiston; Chambers*, *supra*, para. 127; cf. *In re Scottish Petroleum Co.*, 1883, 23 Ch. D. 413; *Stewart's* case, 1866, L.R. 1 Ch. 574; *Anderson's* case, 1881, 17 Ch. D. 373.

[2] *Tennent* v. *City of Glasgow Bank*, 1879, 6 R. 554, (H.L.) 69; *North British Building Co.*, 1882, 22 S.L.R. 833.

[3] *Blaikie* v. *Coats*, 1893, 21 R. 150; *Colquhoun's Tr.* v. *British Linen Co.*, 1900, 2 F. 945; *Gowans* v. *Dundee Steam Navigation Co., Ltd.*, 1904, 6 F. 613; 12 S.L.T. 137.

[4] *Kinghorn* v. *The Glenyards Fireclay Co.*, 1907, 14 S.L.T. 683.

[5] *Houldsworth* v. *City of Glasgow Bank*, 1880, 7 R. (H.L.) 53.

[6] *Arnison* v. *Smith*, 1889, 41 Ch. D. 348; cf. *Campbell* v. *Blair*, 1897, 5 S.L.T. No. 39.

[7] *Tulloch* v. *Davidson*, 1858, 20 D. 1045; 3 Macq. 783; *Addie* v. *Western Bank*, 1865–7, 3 M. 899; 5 M. (H.L.) 80; *New Brunswick Co.* v. *Conybeare*, 1862, 9 H.L.C. 724; *Smith* v. *Chadwick*, 1883, 9 App. Cas. 187; *Derry* v. *Peek*, 1889, 14 App. Cas. 337.

[8] *Supra.*

[9] *Lees* v. *Tod*, 1882, 9 R. 807, 852–854; *Brownlie* v. *Miller*, 1878, 5 R. 1076, 1091–92; *Weir* v. *Bell*, 1878, 3 Ex. Div. 238.

133. Under the Companies Act, 1867 (s. 38), directors and promoters were laid under a heavy liability for statements in a prospectus. The Act was repealed by the Companies Act, 1890, but the decisions throw light upon the requirements of the Act of 1908 (s. 81 (*k*)) as to what are material contracts requiring to be set forth in a prospectus. The section was inserted in the Act of 1867 in supplement of the common law and required every prospectus to specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of the prospectus; and any prospectus not specifying the same was to be "deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus unless he should have had notice of such contract." The section was judicially construed to mean that the prospectus should state the date and parties to every material contract made by the company, or by the directors or promoters, meaning every contract which would be likely to influence the judgment of an intending applicant for shares.[3] The section is not confined to contracts imposing an obligation on the company nor to contracts entered into between promoters as such and others, provided the company was entitled to the benefit and liable to the obligations of the contract before issue of the prospectus.[4] The section includes parole as well as written contracts.[5]

The notice given of the contract must be of its material contents, not merely of its existence.[6] The difficulty of knowing what contracts to disclose led to the adoption of a waiver clause in prospectuses. Such were held valid if fairly disclosing the nature of the rights waived.[7] The Act of 1908 (s. 81 (4)) has excluded the use of such clauses.

A shareholder pleading the section required to prove that he relied on the prospectus[1] and that but for the omission to disclose the contract he would not have subscribed.[2]

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[1] *Adams* v. *Thrift*, [1915] 2 Ch. 21.

[2] *Geipel* v. *Peach*, [1917] 2 Ch. 108. As to the measure of damages, see *M'Connell* v. *Wright*, [1903] 1 Ch. 546; *Twycross* v. *Grant*, 1877, 2 C.P.D. 469; *Shepheard* v. *Broome*, [1904] A.C. 243.

[3] *Sullivan* v. *Mitcalfe*, 1880, 5 C.P.D. 455; *Gover's* case, 1875, 1 Ch. D. 182; *Cackett* v. *Keswick*, [1902] 2 Ch. 456.

[4] *Gover's* case, 1875, 1 Ch. D. 182; *Twycross* v. *Grant*, 1877, 2 C.P.D. 469.

[5] *Capel & Co.* v. *Sim's Composition Co.*, 1888, 36 W.R. 689; *Arkwright* v. *Newbold*, 1881, 17 Ch. D. 301.

[6] *Watts* v. *Bucknall*, [1903] 1 Ch. 766.

[7] *Macleay* v. *Tait*, [1906] A.C. 24; *Watts* v. *Bucknall*, *supra*, and cases cited.

To escape liability the director or promoter sued required to shew that he was not responsible for the prospectus or that he was deceived into giving his sanction to it.[3] It was not enough to profess ignorance of the contents or materiality of the contract[4] or that the contract was honestly considered to be not material.[5]

134. The Act of 1908 (s. 81 (6)) provides that in the event of non-compliance with the requirements of the Act (s. 81) as to what must be stated in a prospectus, a director or other person responsible for a prospectus shall not incur any liability by reason of the non-compliance, if he proves that, (*a*) as regards any matter not disclosed, he was not cognisant thereof, or (*b*) the non-compliance arose from an honest mistake of fact on his part; and in the case of non-statement of the nature and extent of the interest of a director in the promotion or property proposed to be acquired by the company, or his interest as a partner of a firm, unless it be proved that such director or other person had knowledge of the matters not disclosed.

SUBSECTION (5).—*Statement in Lieu of Prospectus.*

135. A company which does not issue a prospectus on or with reference to its formation must not allot any of its shares or debentures unless, before the first allotment of either, there has been filed with the Registrar of Companies a statement in lieu of prospectus, signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in the Second Schedule to the Act (s. 82 (1)). This requirement does not apply to a company which has allotted any shares or debentures before the first day of July 1908, nor to a private company (s. 82 (2)). A company which has filed a statement in lieu of prospectus on or with reference to formation, if making a subsequent issue of shares and issuing a prospectus with a public invitation to subscribe, would be liable to comply with the requirements of the Act as to prospectuses (ss. 80 and 81) so far as applicable to the subsequent issue.

The matters requiring to be stated in a statement in lieu of prospectus are nearly co-extensive with the requirements for a prospectus, but the minimum subscription required to be stated is the minimum subscription upon which the directors may proceed to allotment, or if none be so fixed and named the whole amount of the share capital issued or issuable otherwise than in cash (s. 85 (7); see also ss. 87 and 83).

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[1] *M'Morland's Trs.* v. *Fraser*, 1896, 24 R. 65.

[2] *Macleay* v. *Tait*, [1906] A.C. 24.

[3] *Watts* v. *Bucknall*, [1902] 2 Ch. 628; [1903] 1 Ch. 766; *Hoole* v. *Speak*, [1904] 2 Ch. 732.

[4] *Watts* v. *Bucknall*, [1903] 1 Ch. 766; *Tait* v. *Macleay*, [1904] 2 Ch. 631; *Shepheard* v. *Broome*, [1904] A.C. 342.

[5] *Twycross* v. *Grant*, 1877, 2 C P.D. 469, at p. 542.

136. Neither the insufficiency nor the untruth of the statements made will vitiate an allotment made after the filing of a statement in lieu of prospectus, unless they are so illusory as not to amount to a statement at all.[1] It was held by Lord Sumner, Lord Dunedin expressing the contrary opinion, that an allotment made before the statement is filed is not wholly void and that promoters who have made a profit out of the shares or debentures purporting to be allotted can be made accountable in a winding-up for the profit so made.[2]

Any person wilfully making in the statement in lieu of prospectus a statement false in any material particular, knowing it to be false, is guilty of a misdemeanour and liable on indictment to imprisonment or fine or both (s. 281).

SECTION 9.—MEMBERSHIP.

SUBSECTION (1).—*In General.*

137. Membership of a company is constituted by agreement to become a member, and the entry of the person's name on the register of members (s. 24 (2)). Person includes a body corporate, including a company, if its articles allow it to apply for shares,[3] or a society under the Industrial and Provident Societies Act, 1893.[4] The agreement is between the person and the company. A person can only become a member by contract;[5] hence persons under disability to contract cannot become members. The contract must be with the company or those acting with its authority.[6] A person may agree to become a member by subscription of the memorandum of association, by application for shares and acceptance by the company, by transfer of shares from an existing member, or by transmission in succession to a deceased or bankrupt member. The register is not conclusive, but only *prima facie* evidence of membership,[7] and may be rectified both before and after a winding-up (ss. 32 and 163).

138. A subscriber of the memorandum is deemed to have agreed to become a member, and must be entered in the register of members (s. 24 (1)). No allotment of shares is necessary to make him a member.[8] No lapse of time in entering the subscriber's name on the register will avail to relieve him of liability as a member.[9] He can only escape liability by shewing that all the shares have been allotted to others.[1] The signature of a firm or of trustees as such to the memorandum is not accepted by the Registrar of Joint Stock Companies unless there are, as the case requires, other seven or two individual subscribers.[2]

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[1] *Blair Open Hearth Furnace Co.*, [1914] 1 Ch. 390.

[2] *Jubilee Cotton Mills, Ltd.* v. *Lewis*, [1924] A.C. 958.

[3] *In re Barned's Banking Co.*, 1867, L.R. 4 Ch. 105; s. 68.

[4] 56 & 57 Vict. c. 39, s. 38.

[5] *Hamley's* case, 1877, 5 Ch. D. 706.

[6] *Molleson & Grigor* v. *Fraser's Trs.*, 1881, 8 R. 630; *Migotti's* case, 1867, L.R. 4 Eq. 238.

[7] Sec. 33; *Reese River Silver Mining Co.* v. *Smith*, 1869, L.R. 4 H.L. 80; *Tuffnell's* case, 1885, 29 Ch. D. 421.

[8] *Nicol's* case, 1885, 29 Ch. D. 421, at p. 444; *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 63.

[9] *Levick's* case, 1870, 40 L.J. Ch. 180; *Sidney's* case, 1871, L.R. 13 Eq. 228.

139. A person may, further, become a member by allowing his name to be on the register of members or otherwise holding himself out or allowing himself to be held out as a member.[3] A person who, under the company's articles, is ineligible for membership, but has been admitted to and has accepted membership, cannot plead he is not a member.[4] The bearer of a share warrant may, if the articles of the company so provide, be deemed to be a member of the company, either to the full extent or for any purpose defined in the articles, except that he shall not be qualified in respect of the shares or stock specified in the warrant for being a director or manager of the company, where such a qualification is required by the articles (s. 37 (4)). A member of a company may be such without being a shareholder, because the company may be unlimited or limited by guarantee, and may not in either case have a share capital.

SUBSECTION (2).—*Contract for Membership.*

140. Unless where the company has no share capital, the contract for membership is a contract to take shares of the company and to pay for them. There is no difference between a contract to take shares and any other contract.[5] The form is not material.[6] The contract must be with the company and to take shares from the company.[7] In ordinary circumstances, to constitute a binding contract to take shares in a company there must be an application by the intending shareholder, an acceptance by the company, and a notice of that acceptance to the applicant.[8]

141. The application need not be in writing.[9] It may be made by an agent having authority,[10] or held out as having authority.[11] A mere expression of willingness to take shares is not necessarily an application,[12] and a person who has agreed to "place" shares,[13] or who has an option to take shares,[14] does not thereby agree to take shares. An application may be conditional, and the condition may be suspensive (in England "precedent"),[1] or resolutive (in England "subsequent").[2] If suspensive, there is no contract unless the condition is purified. An agreement to take paid-up shares cannot be converted on a winding-up into an obligation to take shares not fully paid-up.[3] If resolutive, there is membership and a right to enforce the condition against the company.[4] A person cannot be registered with a qualified liability.[5]

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[1] *Mackley's* case, 1875, 1 Ch. D. 247; *Evan's* case, 1867, L.R. 2 Ch. 430.

[2] See Wilton's Company Law and Practice, p. 48.

[3] See Palmer's Company Law, 12th ed., p. 104; *Sewell's* case, 1868, L.R. 3 Ch. 138.

[4] *Aberdeen Master Masons' Incorporation* v. *Smith*, 1908 S.C. 669.

[5] Per Chitty J. in *Nicol's* case, 1885, 29 Ch. D. 421.

[6] *Ritso's* case, 1877, 4 Ch. D. 782.

[7] *Forget* v. *Cement Products Co. of Canada*, [1916] W.N. 259.

[8] *Scottish Petroleum Co.*, 1882, 23 Ch. D. 430.

[9] *Goldie* v. *Torrance*, 1882, 10 R. 174; *Bloxam's* case, 1860, 33 Beav. 529; *City of Glasgow Bank* v. *Nelson Mitchell*, 1879, 6 R. 420, opinion of Lord Shand.

[10] *Hannan's Empress, etc., Co.*, [1896] 2 Ch. 643; *Hindley's* case, [1896] 2 Ch. 121.

[11] *Re Henry Bentley & Co.*, 1893, 69 L.T. 204.

[12] *Mason* v. *Benhar Coal Co.*, 1882, 9 R. 883.

[13] *Gorrissen's* case, 1873, L.R. 8 Ch. 507.

[14] *Humphrey & Denman* v. *Kavanagh*, 1925, 41 T.L.R. 378.

142. Acceptance of an application is ordinarily evidenced by allotment, *i.e.* the appropriation to an applicant by a resolution of the directors of a certain number of shares in response to an application,[6] but it may be evidenced in other ways.[7] Acceptance must be within a reasonable time.[8] An acceptance must be unconditional. If it introduces a new term it is a new offer.[9] An allotment with a condition that the allottee shall be entitled to pay for shares out of fees to be earned by him from the company,[10] or by goods to be supplied, is invalid.[11] Notice of the allotment need not be formal;[12] if brought home to the applicant *aliunde*, it will bind him.[13] It would seem that the contract is not completed by the posting of the notice of allotment if it never reaches the applicant,[14] unless there is an agreement that acceptance of the application may be made by posting. A person telegraphing is to be treated as speaking at the place at which the message is to be delivered.[15] The shares need not be numbered.[16]

143. An application may be withdrawn at any time before acceptance is notified to the applicant,[17] and may be withdrawn orally.[18] Revocation of an application for shares or of the allotment thereof only operates from the date of its actual receipt.[19]

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[1] *Liquidator of Consolidated Copper Co. of Canada* v. *Peddie*, 1877, 5 R. 393; *Gorrissen's* case, 1873, L.R. 8 Ch. 507; *Miln* v. *North British Fresh Fish Supply Co., Ltd.*, 1887, 15 R. 21; *Swedish Match Co., Ltd.* v. *Seivwright*, 1889, 16 R. 989; *Cowan* v. *Gowans*, 1877, 15 S.L.R. 195; *Waverley Hydropathic Co., Ltd.* v. *Barrowman*, 1895, 23 R. 136.

[2] *Fisher's* case, 1885, 31 Ch. D. 125.

[3] *Waterhouse* v. *Jamieson*, 1870, 8 M. (H.L.) 88; *Anderson's* case, 1877, 7 Ch. D. 95; *In re Addlestone Linoleum Co.*, 1888, 37 Ch. D. 191; *In re Macdonald, Sons & Co.*, [1894] 1 Ch. 89; *Gunn* v. *Muirhead*, 1899, 1 F. 1079.

[4] *Elkington's* case, 1867, L.R. 2 Ch. 511; *Bridger's* case, 1870, L.R. 5 Ch. 305; *National House Property Investment Co.* v. *Watson*, 1908 S.C. 888.

[5] *Miln* v. *North British Fresh Fish Supply Co., Ltd.*, 1887, 15 R. 21.

[6] Palmer's Company Law, 12th ed., p. 107.

[7] *Best's* case, 1865, 2 De G. J. & S. 656; *Great Northern Salt and Chemical Works*, 1890, 44 Ch. D. 483; *Curror's Trs.* v. *Caledonian Heritable Security Co.*, 1880, 7 R. 479; but see *Millen & Somerville* v. *Millen*, 1910 S.C. 868; *Moore Bros. & Co., Ltd.*, [1899] 1 Ch. 627.

[8] *Crawley's* case, 1869, L.R. 4 Ch. 322.

[9] *Duke* v. *Andrews*, 1848, 2 Ex. Rep. 290; *Pentelow's* case, 1869, L.R. 4 Ch. 179.

[10] *National House Property Investment Co. Ltd.* v. *Watson*, 1908 S.C. 888.

[11] *In re Richmond Hill Hotel* (*Pellatt's* case), 1867, L.R. 2 Ch. 527.

[12] *Richards* v. *Home Assurance Association*, 1871, L.R. 6 C.P. 591.

[13] *Wallis's* case, 1868, L.R. 4 Ch. 325 n.; *Ex parte Fletcher*, 1867, 37 L.J. Ch. 49; *Chapman* v. *Sulphite Pulp Co., Ltd.*, 1892, 19 R. 837; *Nelson* v. *Fraser*, 1906, 14 S.L.T. 513.

[14] *Mason* v. *Benhar Coal Co.*, 1882, 9 R. 883, per Lord Shand; but see *Household Fire Insurance Co.* v. *Grant*, 1879, 4 Ex. D. 216; Gloag on Contract, p. 41.

[15] *Cowan* v. *O'Conner*, 1888, 20 Q.B.D. 640.

[16] *Adam's* case, 1871, L.R. 13 Eq. 483.

[17] *Hebb's* case, 1867, L.R. 4 Eq. 9; *Ritso's* case, 1877, 4 Ch. D. 774.

[18] *Truman's* claim, [1894] 3 Ch. 272.

[19] *Henthorn* v. *Fraser*, [1892] 2 Ch. 27.

Contrary opinions have been expressed as to whether an allotment made before filing a statement in lieu of prospectus (s. 82 (1)) is wholly void.[1]

144. The stamp duty upon letters of allotment is 6d. where the nominal amount is £5 or upwards, and 1d. where it is below that sum.[2] A letter of allotment may be effective although unstamped.[3]

SUBSECTION (3).—*Register of Members.*

(i) *Contents.*

145. Every company must keep in one or more books a register of its members, and enter therein (1) the names and addresses and the occupations, if any, of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member; (2) the date at which each person was entered in the register as a member; and (3) the date at which any person ceased to be a member (s. 25 (1)). A company failing to comply with this requirement is liable to a penalty not exceeding £5 per day; and a director or manager knowingly or wilfully permitting default is liable to the like penalty.

146. It is declared (s. 27) that no notice of any trust, expressed, implied or constructive, shall be entered in the register, but this is not made applicable to companies registered in Scotland. The practice in Scotland of taking notice of trusts in the register has not for its purpose the altering of the liability of the holders of shares or stock as compared with the liability of other holders, but only the marking of the shares or stock as the property of the particular trust.[4] Trustees so registered do not escape personal liability as contributories in their own right;[5] they are jointly and severally liable,[6] and the permission to notice trusts is *prima facie* a permission introduced for the benefit of the beneficiaries.[7] The entries demonstrate the trust and render proof unnecessary.[8] Intimation to the company by assumed trustees of their assumption entitles the company to put them on the register without a formal transfer.[9] But an executor may produce the evidence of his title for the purpose of having it recorded without his name being entered in the register, and may execute transfers of the shares of the deceased (s. 29). When executors are registered as joint holders, each of them is a registered holder.[1] A *curator bonis* or a mandatary of a member may receive dividends without going on the register.[2] The right of a partnership to go on the register in Scotland has apparently never been tested. In practice the individual partners are registered as trustees for the firm.[3] A person obtaining an allotment of shares, and authorising his name to be placed on the register, is not entitled to have it removed on the ground that by agreement with the directors his name was entered there only that he might place the shares among persons willing to take them.[4] Intimation to a company of an assignation in security or equitable mortgage is not a notice of trust under s. 27.[5]

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[1] *Jubilee Cotton Mills, Ltd.* v. *Lewis*, [1924] A.C. 958, per Lord Sumner and Lord Dunedin; the Court of Appeal held the issue of such shares void, [1923] 1 Ch. 1.

[2] Stamp Act, 1891, s. 79, and Schedule I., as amended by Finance Act, 1899, s. 9.

[3] *Re Whitley Partners, Ltd.*, 1886, 32 Ch. D. 337.

[4] Lord Pres. Inglis in *City of Glasgow Bank* v. *Muir*, 1878, 6 R. 392, (H.L.) 21.

[5] *Muir, supra*; *Cree* v. *Somervail*, 1879, 6 R. 80, (H.L.) 90.

[6] *Cunninghame* v. *City of Glasgow Bank*, 1879, 6 R. 679, (H.L.) 98.

[7] Lord Cairns in *Muir, supra*.

[8] Lord Shand in *Dalgleish* v. *Land Feuing Co., Ltd.*, 1885, 13 R. 223.

[9] *Bell* v. *City of Glasgow Bank*, 1879, 6 R. 548, (H.L.) 55.

147. Notice of any change of address should be entered in the register. A memorandum of a lien over shares must not be entered in the register.[6]

148. On the application of the transferor of any share or interest in a company, the company must enter in the register the name of the transferee in the same manner and subject to the same conditions as if the application were made by the transferee (s. 28). The transferor is thus able to protect himself after he has parted with his holding. If the company has valid objections to the registration of a transfer or to the name of a purchaser who refuses to take the necessary steps to have himself registered, such objections would be a defence to any application at the instance of the transferor. But a transferee for value does not take shares subject to personal pleas in bar that might be stated by the company against the transferor.[7] The transferee obtains a statutory title and takes it subject to those conditions only which affect the shares themselves. On certification by the secretary of a company that share certificates have been lodged with him in connection with a transfer, the company is not barred from repudiating his certificate.[8] Where a company is called upon to register a transfer, and receives notice from some other person that he claims an interest in the shares or stock, its proper course is to intimate to such other person that unless he follows up his intimation promptly, by bringing a process of interdict or taking some other step, the transfer will be registered.[9] Where a company wrongfully refuses to register a transferee, it will be liable in damages.[10]

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[1] *Galloway Saloon Steam Packet Co.* v. *Wallace*, 1891, 19 R. 330; *M'Ewen* v. *City of Glasgow Bank*, 1879, 6 R. 1315; *Gordon* v. *City of Glasgow Bank*, 1879, 7 R. 55.

[2] See *Lindsay's Curator* v. *City of Glasgow Bank*, 1879, 6 R. 671; cf. *Lumsden* v. *Peddie*, 1866, 5 M. 34.

[3] *Gillespie & Paterson* v. *City of Glasgow Bank*, 1879, 6 R. 714; (H.L.) 104.

[4] *Miln* v. *North British Fresh Fish Supply Co., Ltd.*, 1887, 15 R. 21.

[5] *E.g. Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20.

[6] *In re Key & Son*, [1902] 1 Ch. 467.

[7] *Edinburgh Northern Tramways Co.* v. *Mann*, 1891, 18 R. 1140; 1892, 20 R. (H.L.) 7.

[8] *George Whitechurch, Ltd.* v. *Cavanagh*, [1902] A.C. 117.

[9] Per Lord M'Laren in *Shaw* v. *Caledonian Rly. Co.*, 1890, 17 R. 466; Eve J. in *Grundy* v. *Briggs*, [1910] 1 Ch. 444.

[10] Clark on Partnership, p. 106; *Skinner* v. *City of London Marine Insurance Corporation*, 1885, 14 Q.B.D. 882.

149. Where the articles of a company, not being a private company, authorise the issue of share warrants to bearer, on the warrant being surrendered by the bearer for cancellation the bearer's name must be entered in the register of members (s. 37 (3)). If the articles so provide, the bearer of a share warrant may be deemed to be a member of the company, either to the full extent or for any purpose defined in the articles, but not so as to qualify him in respect of the shares or stock specified in the warrant for being a director or manager of the company, where such a qualification is required by the articles (s. 37 (4)). On the issue of a share warrant, the name of the member then entered in the register as holding the shares or stock specified in the warrant must be struck out of the register and the following particulars entered, namely: (1) the fact of the issue of the warrant; (2) a statement of the shares or stock included in the warrant, distinguishing each share by its number; and (3) the date of the issue of the warrant (s. 37 (5)). On the surrender of the warrant, the date of the surrender must be entered as if it were the date at which a person ceased to be a member (s. 37 (6)).[1]

150. Every company having a share capital must once at least in every year make a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or (in the case of a first return) since the incorporation of the company, and a summary of other particulars (s. 26). The list and summary must be contained in a separate part of the register of members, and must be completed within seven days after the fourteenth day aforesaid, and a copy signed by the manager and secretary must be forthwith forwarded to the Registrar of Companies under penalties on the company, directors and managers for default (s. 26 (4) and (5)).

(ii) *Evidence of Matters Recorded.*

151. The register of members is *prima facie* evidence of any matters by the Act of 1908 directed or authorised to be inserted therein.[2] Hence the prescribed mode of keeping the register must be strictly complied with.[3] Mere entry of a person's name in the register cannot make him a member if there is no contract. The register may be rectified both before and after a winding-up (ss. 32 and 163). Even where the register cannot be rectified, *e.g.* in proceedings for penalties, the truth of the entries in the register can be impugned.[4] The register may not be conclusive in questions between husband and wife.[5]

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[1] The Non-Ferrous Metal Industry Act, 1918, s. 4, empowers companies to which that Act applies to require the surrender of share warrants.

[2] Sec. 33; *Reese River Silver Mining Co.* v. *Smith*, 1869, L.R. 4 H.L. 80; *Tuffnell's* case, 1885, 29 Ch. D. 421.

[3] *Bain* v. *Whitehaven and Furness Junction Rly. Co.*, 1850, 3 H.L.C. 1.

[4] *Briton Medical and General Life Assurance Co.*, 1888, 39 Ch. D. 61.

[5] *Steedman* v. *City of Glasgow Bank*, 1879, 7 R. 111; *Carmichael* v. *Do.*, 1879, 7 R. 118; *Thomas* v. *Do.*, 1879, 6 R. 607.

(iii) *Custody and Inspection.*

152. The register of members, commencing from the date of the registration of the company, must be kept at the registered office of the company, and, except when closed under the provisions of the Act, must during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member *gratis*, and to the inspection of any other person on payment of one shilling, or such less sum as the company may prescribe, for each inspection (s. 30 (1)).[1] The person inspecting is authorised to require a copy from the company, at the rate of sixpence per hundred words, but he is not entitled himself to make a copy.[2]

153. This provision of opening the register to the inspection of all the world is part of the policy of the legislature in conceding limited liability. Its object is to enable persons dealing with the company to know to whom and to what they have to trust.[3] A shareholder cannot be refused inspection because he does not state his object,[4] nor because he is using his rights in the interests of a rival company,[5] unless it be in a suit in which he purports to sue on behalf of himself and all other members of the company.[5] Inspection may be required on behalf of a creditor or member by his solicitor or accountant under conditions protecting the company's interests.[6] Liquidation renders the section inoperative.[7]

The Court may compel inspection (s. 30 (3)).[8] The company, as well as directors and managers, is liable to a penalty for refusal to allow inspection or give a copy (s. 30 (3)).

The company is empowered to close the register by advertisement for thirty days in each year (s. 31). This power is exercised at the time of the annual meeting.

(iv) *Rectification.*

154. The register being the authentic evidence of the constituency of the company, it is very important that it should truly represent that constituency, *i.e.* that it should contain the names of the persons, and only of the persons, who are from time to time the real shareholders. For this purpose the legislature has supplied a summary mode of rectifying the register. Directors ought not at their own hands to alter the register unless they have a transfer or other warrant entitling them to do so,[1] but such action has been upheld in exceptional circumstances.[2] Procedure may be by summary petition to the Court of Session (s. 32 (2)). If (*a*) the name of any person is without sufficient cause entered in or omitted from the register of members of a company, or (*b*) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register (s. 32 (1)). The Court may award damages against the company (s. 32 (2)). The company or the liquidator may invoke this procedure.[3] A crave for an order directing notice of rectification to be given to the Registrar is inserted in the prayer of applications to rectify (s. 32 (4)).

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[1] *Mutter* v. *Eastern and Midland Rly. Co.*, 1888, 38 Ch. D. 92.

[2] *In re Balaghat Gold Mining Co., Ltd.*, [1901] 2 K.B. 665. The right to inspect carries with it the right, in the case of companies under the Companies Clauses Acts, to take copies.

[3] *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 367; and see *Sewell's* case, 1868, L.R. 3 Ch. 131, at p. 138; *Lawrence's* case, 1867, L.R. 2 Ch. 417; *Scottish Petroleum Co.*, 1883, 23 Ch. D. 413.

[4] *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 248.

[5] *Mutter, supra.*

[6] *Norey* v. *Keep*, [1909] 1 Ch. 501; *Bevan* v. *Webb*, [1901] 2 Ch. 59.

[7] *Kent Coalfields Syndicate, Ltd.*, [1898] 1 Q.B. 754.

[8] Wilton's Company Law and Practice, p. 65.

155. "Unnecessary delay" on the part of directors in registering a transfer is not by itself a good ground for an order upon a company to register. The company is not precluded from maintaining good grounds for its refusal, and the transferor may, by allowing time to elapse before complaining to the Court, lose his remedy.[4]

156. The Court may alter the register in cases other than those specified in s. 32.[5] Rectification has been allowed so as to allow of shares being entered as fully paid up under a contract for payment otherwise than in cash, where such contract had not been filed under the Act of 1867.[6] But it is a question of circumstances and discretion whether the Court will permit the adoption of procedure by way of petition when the right in dispute is more appropriately tried in another form of action, such as reduction or declarator,[7] or where the circumstances present difficult and complex questions.[8] The case intended to be tried under a summary application is the question whether the person whose name is on the register of shareholders has agreed to become an original allottee or a transferee of shares in the company.[9] Misrepresentation has been entertained as a ground for a summary application in some cases;[10] in other cases not.[11] A subscriber to the memorandum cannot, after registration, repudiate his subscription on the ground of misrepresentation.[1] The Court will allow rectification in an ordinary action with the appropriate executorial conclusions, *e.g.* for an order on the secretary or other official of the company to rectify the register,[2] or by way of incidental relief, *e.g.* in an application for removal of names from the list of contributories.[3] But the company must be a defender in such actions.[4] Directors are not proper parties as respondents in rectification applications.[5]

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[1] *Galashiels Masonic Hall*, 3rd February 1911 (n.r.); Wilton's Company Law, p. 75.

[2] *Anglo-American Land Mortgage and Agency Co., Ltd.* v. *Scottish Investment Trust Co., Ltd.*, 1896, 4 S.L.T. 37.

[3] Secs. 32, 163; *Simpson* v. *Boson Oil Co., Ltd.*, 1889, 16 R. 391; *Re Indo-China Steam Navigation Co.*, [1917] 2 Ch. 100.

[4] *Property Investment Co. of Scotland, Ltd.* v. *Duncan*, 1887, 14 R. 299.

[5] *Burns* v. *Siemens Bros. Dynamo Works*, [1919] 1 Ch. 225.

[6] Sec. 25; *Harvey* v. *The Distillers Co., Ltd.*, 1885, 22 S.L.R. 532.

[7] *E.g.*, *Blaikie* v. *Coats*, 1893, 21 R. 150; *Colquhoun's Tr.* v. *British Linen Co.*, 1900, 2 F. 945; *Gowans* v. *Dundee Steam Navigation Co.*, 1904, 6 F. 613; 1904, 12 S.L.T. 137.

[8] *Sleigh* v. *Glasgow and Transvaal Options, Ltd.*, 1904, 6 F. 420; *In re Greater Britain Products Development Corporation*, 1924, 40 T.L.R. 488.

[9] Per Lord M'Laren in *Sleigh, supra.*

[10] *Blakiston* v. *London and Scottish Banking and Discount Corporation, Ltd.*, 1894, 21 R. 417; *Scottish Petroleum Co.*, 1883, 23 Ch. D. 413; *Chambers* v. *Edinburgh and Glasgow Aerated Bread Co., Ltd.*, 1891, 18 R. 1039.

[11] *Blaikie* v. *Coats*, 1893, 21 R. 150.

157. The Court has power in a winding-up to order rectification (s. 163).[6] A liquidator ought not to alter the register at his own hand. Where through the fault of the company names are on the register of members at the date of liquidation relief is still open,[6] even though calls have been decerned for,[7] or in questions between spouses.[8] But rectification on the ground that the contributory was induced to accept his shares through fraudulent misrepresentations of the officials of the company will not be allowed after liquidation or public insolvency of the company [9] has ensued, because of the prejudice which would be sustained by creditors.[10]

(v) *Colonial Registration.*

158. A company having a share capital, whose objects comprise transaction of business in a colony, may, if authorised by its articles, keep in that colony a branch register of members resident in it. The colonial register is deemed part of the company's register, but is under the jurisdiction of the colonial Court for rectification, and penalties may be enforced by a colonial Court having summary criminal jurisdiction. The company is required to transmit to its registered office a copy of every entry in the colonial register as soon as made; and to keep a duplicate of the colonial register at that office. Shares registered in a colonial register are deemed to be property situated out of the United Kingdom, and transfers, unless executed in the United Kingdom, are exempt from British stamp duty. The shares registered in a colonial register of a member who dies domiciled in the United Kingdom are deemed to be estate in the United Kingdom in respect of probate or inventory duty, just as if they were registered in the principal register (ss. 34, 35, and 36).

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[1] *Metal Constituents, Ltd.* (*Lord Lurgan's* case), [1902] 1 Ch. 707.

[2] *Glenyards Fireclay Co.*, 1907, 14 S.L.T. 683.

[3] *Furness & Co.* v. *Liqrs. of Cynthiana Steamship Co., Ltd.*, 1893, 21 R. 239.

[4] *Watt* v. *Kempt*, 1865, 3 M. 730.

[5] *Keith, Prowse & Co.*, [1918] 1 Ch. 487 ; *Copal Varnish Co.*, [1917] 2 Ch. 349.

[6] *E.g.*, *Furness*, *supra* ; *Liqr. of Florida Mortgage and Investment Co., Ltd.* v. *Bayley*, 1890, 17 R. 523.

[7] *Stocker* v. *Liqrs. of Crestonholm Paper Mills, Ltd.*, 1891, 19 R. 17 ; *Jackson* v. *Liqr. of Star Fire and Burglary Insurance Co.*, 1902, 10 S.L.T. 279.

[8] *Steedman* v. *City of Glasgow Bank*, 1879, 7 R. 111 ; *Carmichael* v. *Do.*, 7 R. 118 ; *Thomas* v. *Do.*, 1879, 6 R. 607.

[9] *Hunter* v. *City of Glasgow Bank*, 1879, 6 R. 728, (H.L.) 112 ; *Howe* v. *Do.*, 1879, 6 R. 1194 ; *Nelson Mitchell* v. *Do.*, 1878, 6 R. 420, (H.L.) 66 ; *Stenhouse* v. *Do.*, 1879, 7 R. 102 ; contrast *Cochrane* v. *Do.*, 1879, 16 S.L.R. 234 ; *Shaw* v. *Do.*, 1878, 6 R. 332 ; *Mitchell* v. *Do.*, 1879, 6 R. 439, (H.L.) 60.

[10] *Tennent* v. *City of Glasgow Bank*, 1879, 6 R. 554, (H.L.) 69 ; *Carrick & Ors.*, 1885, 22 S.L.R. 833.

These provisions apparently now apply to Ireland.[1]

SUBSECTION (4).—*Rights and Liabilities of Members.*

(i) *In General.*

159. A company is a statutory corporation made up of members who can act within certain limits which must be ascertained from the statute under which it is created,[2] and whose rights may differ from the rights inherent in the members of a corporation at common law.[3] The rights of members of a company may arise under the Companies Acts, under the memorandum of association of the company, under the articles of association, or under the common law. The rights may be of an individual nature or may inhere in the members generally, as where the statute prescribes the exercise of rights by a prescribed majority of the members.

160. The liability of members of a company for the debts of the company varies according as the company is unlimited, or limited by shares or guarantee or by both. The liability is personal except in the cases of a trustee in bankruptcy (s. 127) and the personal representatives of a deceased member, when the liability is the liability of the member's estate.[4] Where a company has been carrying on business for more than six months with less than two members in the case of a private company, or seven members in the case of any other company, each member cognisant of the fact is severally liable for the whole debts of the company contracted during that time (s. 115). This several liability does not attach to the trustee in bankruptcy of a member nor to the representatives of deceased members.[5] In the case of an unlimited company, the liability of a member on a winding-up is unlimited and extends to an amount sufficient for payment of its debts and liabilities and the costs of the winding-up and for the adjustment of the rights of contributories among themselves (s. 123 (1)). But the liability of individual members upon a policy of insurance or other contract of the company may be restricted by a provision therein so restricting it or making the funds of the company alone liable in respect of the contract.[6] When an unlimited company has a share capital the liability of the members, while it is a going concern, is limited to the amount unpaid on its shares as expressed in the articles of association (s. 10 (3)) and on its being wound up is unlimited.[1] In the case of a company limited by guarantee the member's liability for debts of the company is limited to the amount which he undertakes by the memorandum of association to pay in the event of the company being wound up, and to that extent he is liable as a contributory,[2] but a member may in addition be liable to fellow-members under the articles of association, and in respect of this liability he is merely a debtor and not a contributory.[3] If the company has a share capital a member is liable in addition to contribute to the extent of any sums unpaid on shares held by him (s. 123 (3)). The liability of a member of a company limited by shares, stated generally, is to pay for his shares in terms of his contract of membership. This liability, unless in special circumstances, only arises on calls being made in terms of the articles,[4] and ceases on his ceasing to be a member of the company, unless a winding-up supervenes within twelve months thereafter (s. 123 (1) (i) (ii)). The liability in respect of debts of the company is limited to the amount remaining unpaid on the nominal amount of the shares, but the articles may impose an additional liability towards other members.[5]

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[1] See Palmer's Company Law, 12th ed., p. 132; s. 34 (3); Irish Free State Constitution Act, 1922, 2nd Schedule; *Art. O'Brien's* case, [1923] 2 K.B. 361.

[2] *Baroness Wenlock* v. *River Dee Co.*, 1883, 36 Ch. D. 675 n.

[3] *Ashbury Railway Carriage Co.* v. *Riche*, 1875, L.R. 7 H.L. 653; *London County Council* v. *Attorney-General*, [1902] A.C. 165; *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A.C. 87.

[4] *Buchan's* case, 1879, 4 App. Cas. 549.

[5] *Re Dowling & Welby's Contract*, [1895] 1 Ch. 663.

[6] *Lethbridge* v. *Adams*, 1872, L.R. 13 Eq. 547.

(ii) *Calls.*

161. The term "call" signifies the demand for contribution of capital made by directors of a company upon shareholders or by a liquidator upon contributories. It also means the sum demanded.

162. A member of a company with a share capital is under liability to pay up the amount for the time being unpaid on his shares in accordance with the provisions of the articles of association. A call is made by the directors passing a resolution, and a member is entitled to notice stating when, where, and to whom it is payable.[6] He must pay in money, or, if his contract so provides, in money's worth. He may not be required to pay up at once, or the whole amount unpaid at one time (see Table A, Art. 12). A provision in articles that directors may "from time to time" make calls upon the members does not operate by way of limitation, but is merely descriptive, *i.e.* makes clear that the directors are not restricted to calling up the whole of the unpaid capital at one time.[7] When the articles limit any call to so much per share, the directors may make two or more calls, each up to the limit, at once, but payable at different dates.[7] Authority in the articles is not required to enable a call to be made payable in instalments.[8] The articles may empower the directors to make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment (Table A, Art. 16; s. 39 (1)), and to pay dividends in proportion to the amount paid up on each share (Art. 39 (3)).[1] The articles may provide for payment of interest on calls unpaid (Table A, Art. 14), but such provision will not apply in liquidations.[2] Interest at 5 per cent. per annum is usually made payable under a decree obtained by the liquidator.

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[1] *Bartlett* v. *Mayfair Property Co.*, [1898] 2 Ch. 28.

[2] *The Premier Underwriting Association* (No. 1), [1913] 2 Ch. 29.

[3] *Lion Insurance Association* v. *Tucker*, 1883, 12 Q.B.D. 126; *Baird's* case, [1899] 2 Ch. 593.

[4] *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56.

[5] *Maxwell's* case, 1875, L.R. 20 Eq. 585.

[6] See *Ferguson* v. *Central Halls Co., Ltd.*, 1881, 8 R. 997; *In re Cawley & Co.*, 1889, 42 Ch. D. 209.

[7] *The Universal Corporation, Ltd.* v. *Hughes*, 1909 S.C. 1434, per Lord Dunedin.

[8] *Ambergate, etc. Rly. Co.* v. *Norcliffe*, 1851, 6 Ex. Reps. 629; *Lawrence* v. *Wynn*, 1839, 5 M. & W. 355.

163. A call, to be enforceable, must have been validly made, *i.e.* in accordance with all the provisions of the articles.[3] It is the duty of the directors to enforce payment.[4] The amount of moneys unpaid on shares when validly called is a debt due to the company (s. 14 (2)).[5] Hence the transferor of shares is liable for calls made before the transfer is registered, and the estate of a deceased member is likewise liable for all unpaid share capital.[6] It is a relevant defence to an action by a company for a call that the defender is not a member of the company, and did not agree to become one, or was induced by misrepresentations made by or on behalf of the company;[7] also that calls were not validly made.[8] Compensation or set off in respect of a debt due by the company to the shareholder is also competent,[9] the company being a going concern,[10] but an agreement to set off must be concluded and competently proved, or if the plea of set off be taken in Court it must be sustained, in either case before the commencement of the winding-up.[11] If a call be not paid before a company goes into liquidation, it becomes enforceable by the liquidator, and may be recovered by him.[12] The power to make calls must be exercised for the general benefit of the company,[13] and calls should be made *pari passu* on all the shareholders unless on very special grounds.[14] Directors can be interdicted against improperly making a call or enforcing it by forfeiture *pendente lite*.[15]

164. The articles may, and usually do, provide for the acceptance by the company of payment in advance of calls and for the payment of interest on the sums so advanced (Table A, Art. 17). This power should only be exercised when in the opinion of the directors the moneys advanced can be advantageously employed for the purposes of the company.[1] Where payment of interest on moneys so advanced is provided for in the articles, it is payable irrespective of profits and may be paid out of capital.[2] Moneys so advanced are to be regarded as a loan until a call is made, but the loan is not repayable [2] unless with the assent of the shareholder or by way of reduction of capital.[3] Moneys so advanced rank for payment in a winding-up *prima facie* before capital not so advanced.[4] Calls paid up under the Companies Act, 1867 (s. 24 (2) *et seq.*), are not advances but true payments of capital, and do not bear interest, but draw dividends from profits.

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[1] *Oakbank Oil Co., Ltd.* v. *Crum*, 1881, 9 R. 198; affd. 1882, 10 R. (H.L.) 11.

[2] *Welsh Flannel and Tweed Co.*, 1875, L.R. 20 Eq. 360, per Malins V.-C. at p. 368.

[3] *E.g., Garden Gully United Quartz Mining Co.* v. *M'Lister*, 1875, 1 App. Cas. 46; *Re Cawley & Co.*, 1889, 42 Ch. D. 209; *New Zealand Co.* v. *Peacock*, [1894] 1 Q.B. 622.

[4] *Spackman* v. *Evans*, 1868, L.R. 3 (H.L.) 171, at p. 186.

[5] See *Ferguson* v. *Central Halls Co., Ltd.*, 1881, 8 R. 997.

[6] *Stewart's Trs.* v. *Evans*, 1871, 9 M. 810; *New Zealand Co.* v. *Peacock*, [1894] 1 Q.B. 622.

[7] *City of Edinburgh Brewery Co.* v. *Gibson's Tr.*, 1867, 7 M. 886.

[8] See *Ferguson, supra*, as to effect of want of notice of a call.

[9] *Lerocque* v. *Beauchemin*, [1897] A.C. 358.

[10] *Millar* v. *Aikman*, 1891, 28 S.L.R. 955; *Cowan* v. *Shaw*, 1878, 5 R. 680; *Christie* v. *Taunton, Delmard, Lane & Co.*, [1893], 2 Ch. 175.

[11] *Cowan* v. *Gowans*, 1878, 5 R. 581.

[12] Sec. 165; *Liqrs. of Benhar Coal Co., Ltd.*, 1882, 9 R. 763.

[13] *Gilbert's* case, 1870, L.R. 5 Ch. 559; *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56.

[14] *Galloway* v. *Hallé Concerts Society*, [1915] 2 Ch. 233; *Odessa Tramways Co.* v. *Mendel*, 1878, 8 Ch. D. 235, at p. 245.

[15] *Lamb* v. *Sambar Rubber Co.*, [1908] 1 Ch. 845; *Jones* v. *Pacaya Rubber Co.*, [1911] 1 K.B. 455.

165. The articles may provide for forfeiture of shares by resolution of the directors for failure to pay calls (Table A, Arts. 24–30). Without such provision such forfeiture is *ultra vires* of the company.[5] *Prima facie* forfeiture prevents the holder being sued for past calls.[6] The purchaser of a forfeited share, re-issued as partly paid up, is liable for calls made subsequent to the date of the certificate.[7]

166. Uncalled capital is part of the assets of a company, and loss of capital appearing in a liquidation should be borne by the members in proportion to the nominal capital held by them respectively, and if the shares are unequally paid up, a call to equalise them should be made, subject to the articles.[8] The Court is expressly empowered to make and enforce payment of calls in a liquidation.[9] With a view to preserving the company's right to calls so far as unpaid against a member who has been sequestrated and discharged the company ought to claim in the sequestration for the amount unpaid on the shares, whether called or not.[10]

167. After a call has been made, it may be arrested in the hands of a member at the instance of a creditor of the company.[11]

(iii) *Lien on Shares.*

168. By the common law of Scotland a company has a lien or right of retention over its shares for debts due by the holder to the company.[12]

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[1] *Poole, Jackson & Whyte's* case, 1878, 9 Ch. D. 322; *Lock* v. *Queensland Investment and Land Mortgage Co.*, [1896] 1 Ch. 397; [1896] A.C. 467.

[2] *Lock, supra.*

[3] *London and Northern S.S. Co.* v. *Farmer*, [1914] W.N. 200; 111 L.T. 204.

[4] Cf. *Ex parte Maude*, 1870, L.R. 6 Ch. 51.

[5] *Clarke* v. *Hart*, 1858, 6 H.L.C. 633.

[6] *Stocken's* case, 1868, L.R. 3 Ch. 412; *Ladies' Dress Association* v. *Pulbrook*, [1900] 2 Q.B. 376. See *infra*, para. 203.

[7] *New Balkis Eersteling, Ltd.* v. *Randt Gold Mining Co.*, [1904] A.C. 165.

[8] *Paterson* v. *M'Farlane*, 1875, 2 R. 490; *Stewart* v. *Liqr. of Scoto-American Sugar Syndicate, Ltd.*, 1901, 3 F. 585; *Ex parte Maude*, 1870, L.R. 6 Ch. 51; *Welton* v. *Saffery*, [1897] A.C. 299; *Re Kinatan (Borneo) Rubber, Ltd.*, [1923] 1 Ch. 124.

[9] Secs. 166, 179; on the subject of calls in a liquidation, see LIQUIDATION.

[10] *Cresswell Ranche and Cattle Co.* v. *Balfour-Melville*, 1901, 39 S.L.R. 841; cf. *Taylor* v. *Union Heritable Securities Co., Ltd.*, 1889, 16 R. 711.

[11] *Queensland Mercantile and Agency Co., Ltd.* v. *Australasian Investment Co., Ltd.*, 1888, 15 R. 935; and [1892] 1 Ch. 219.

[12] Per Lord Pres. Inglis in *Bell's Trs.* v. *Coatbridge Tinplate Co., Ltd.*, 1886, 14 R. 246.

This entitles the company to refuse to register a transfer, and also to sell the shares in satisfaction of the debt. Articles commonly provide that the company shall have a first and paramount or permanent lien upon shares for all debts of the holders thereof. Without a similar provision a company in England has no lien or charge.[1] "Holder," subject to the context, means "registered holder," not "true owner." [2] The company's charge is liable to be affected by notice of any charge or mortgage of the shareholder's interest. The company cannot claim priority over the charge or mortgage in respect of subsequent advances made by the company to the shareholder.[3] It is doubtful whether an exemption clause—relieving the company of any obligation to take notice of equities in relation to its shares—will be effectual for that purpose.[4] In England, it has been held that a provision in articles that a lien may be enforced by forfeiture of the shares is not effective, as being an attempt to clog the equity of redemption.[5] It is thought that in the law of Scotland a similar provision would be ineffectual.[6] An attempt to create a lien by altering the articles subsequent to the presentation of a transfer for registration, with the object of entitling the directors to refuse registration, is ineffectual.[7] Articles usually provide that directors may decline to register any transfer of shares over which the company has a lien (Table A, Art. 20).

(iv) *Alteration of Member's Position and Termination of Membership.*

169. The statutory rights of a member are alterable only in so far as the statutes allow. Rights conferred by the memorandum are alterable only in the cases, in the mode, and to the extent for which express provision is made in the Act of 1908 (s. 7). Rights conferred by the memorandum, not required to be inserted therein, may be altered by an arrangement between the company and its members, under s. 120,[8] or by provision for such alteration in the memorandum itself,[9] but are otherwise unalterable.[10] Rights contained in the articles are alterable only by altering the articles, but this procedure will not suffice if the rights be given by contract outside the articles.[11]

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[1] *Dunlop* v. *Dunlop*, 1882, 21 Ch. D. 583.

[2] *Paul's Tr.* v. *Thomas Justice & Sons, Ltd.*, 1912 S.C. 1303.

[3] *Bradford Banking Co.* v. *Briggs*, 1886, 12 App. Cas. 29; cf. *Union Bank of Scotland* v. *National Bank of Scotland*, 1886, 14 R. (H.L.) 1.

[4] *Mackereth* v. *Wigan Coal and Iron Co., Ltd.*, [1916] 2 Ch. 293; Palmer's Company Law, 12th ed., p. 161 *et seq.*

[5] *Hopkinson* v. *Mortimer, Harley & Co.*, [1917] 1 Ch. 646; Palmer's Company Law, 12th ed., p. 166.

[6] See *General Property and Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282.

[7] *Liqr. of W. & R. M'Arthur, Ltd.* v. *Gulf Line, Ltd.*, 1909 S.C. 732.

[8] See Wilton on Alterations on the Memorandum, p. 115.

[9] *Re Welsbach Incandescent Gas Light Co.*, [1904] 1 Ch. 87.

[10] See *Ashbury* v. *Watson*, 1885, 30 Ch. D. 376; but see *Incorporated Glasgow Dental Hospital* v. *Lord Advocate*, 1927 S.N. 30.

[11] *British Equitable Assurance Co.* v. *Baily*, [1904] 1 Ch. 374; [1906] A.C. 35; *British Murac Syndicate* v. *Alperton Rubber Co.*, [1915] 2 Ch. 186.

A member ceases to be a member by death, transfer of his shares, forfeiture or surrender of his shares, sale of his shares in exercise of the company's lien, or dissolution of the company.

SECTION 10.—SHARES.

SUBSECTION (1).—*In General.*

170. Share means a share in the share capital of the company and includes stock, except where a distinction between shares and stock is expressed or implied. A share in a company, like a share in a partnership, signifies a definite portion of its capital, a definite proportion of the joint estate after it has been turned into money and applied so far as may be necessary in payment of the joint debts. But it denotes also the various rights and liabilities which are incidental to the ownership of a share under a company's constitution.[1] These rights usually include a right to receive dividends and a right to vote.[2] A shareholder has no right to sell any part of the property which belongs to the company as an undertaking. The business of the company is an entirety.[3] A shareholder has merely a right to share in the profits of the trading and to transfer his share to another. Each share in a company having a share capital must be distinguished by its appropriate number (s. 22 (2)), unless in the case of a joint stock company whose shares are not numbered, when registered under the Act of 1908 (s. 263 (ii) (*b*)).

171. A share is moveable or personal estate (s. 22), and in England is a chose in action.[4] A share may be held by several persons on the footing of a joint and several liability.[5] In Scotland it is arrestable whether in security or in execution or to found jurisdiction,[6] and whether a dividend has been declared or not.[7] Security rights may be constituted over shares by transfer to and registration in name of the lender.[8] The right to shares may be assigned. No writing is necessary in Scotland to prove an agreement to take shares of an ordinary joint stock company.[9] Stocks and shares of banks, except the Bank of England, require writing for their assignation,[10] and the stock of the Royal Bank of Scotland is in terms of its charter adjudgeable only.

172. The shares of a company may be of different amounts and be divided into different classes with different rights attached to them, as defined in the memorandum and articles of association. These classes are ordinary, preference, and founders' shares. The rights are properly defined in the articles, but may be included in the memorandum if it be desired to make them unalterable. When the memorandum of association contains nothing to the contrary, the company may create and issue new shares with preferential or other special rights attached.[1] Founders' or deferred shares are mostly subscribed by vendors and promoters but may be issued as a bonus to subscribers for other shares. The rights attached to them are usually defined in the memorandum, *e.g.* as to dividend and voting. Preference shares may carry a right to a preferential dividend only or also to a priority in the division of capital on winding up.

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[1] See Rights and Liabilities of Members, *supra*.

[2] Lindley, Company Law, 6th ed., p. 628.

[3] *Bank of Hindustan* v. *Alison*, 1870, L.R. 6 C.P. 54, at p. 74; *Zuccani* v. *Nacupai Gold Mining Co.*, 1888, 60 L.T. 23.

[4] *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 426.

[5] *Wishart & Dalziel* v. *City of Glasgow Bank*, 1879, 6 R. 823; *Grundy* v. *Briggs*, [1910] 1 Ch. 444.

[6] *Sinclair* v. *Staples*, 1860, 22 D. 600; *Valentine* v. *Grangemouth Coal Co.*, 1897, 35 S.L.R. 12; *Harvey's Yoker Distillery, Ltd.* v. *Sinclair*, 1901, 8 S.L.T. 369; *American Mortgage Co. of Scotland, Ltd.* v. *Sidway*, 1908 S.C. 500.

[7] *American Mortgage Co.*, *supra*.

[8] See Mortgages, *infra*, para. 200.

[9] *Goldie* v. *Torrance*, 1882, 10 R. 174.

[10] Leeman's Act, 1867 (30 Vict. c. 29)—the Act is disregarded on the Stock Exchange; *Nelson Mitchell* v. *City of Glasgow Bank*, 1878, 6 R. 420.

173. A company may not sell its shares at a discount. When the legislature in the Companies Acts sanctioned the principle of limited liability, it made it a condition of the privilege that the capital should be real, not a sham, and to this end it required that the capital be paid up in full, and no shares issued at a discount.[2] To put a stop to the practice of taking payment for shares in kind without any certain criterion of value, the legislature, in the Companies Act, 1867 (s. 25), provided that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." The Act of 1908 requires a company limited by shares, within one month after the allotment of any of its shares, to file with the Registrar of Companies, in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which the allotment was made (s. 88 (1) (*b*)).

174. The decisions under the Act of 1867 are still useful and of authority on the question of what is payment in cash. It is payment in cash to set off by agreement a debt presently due to the shareholder from the company against the amount due on the shares.[3] But a mere agreement by a company to pay a sum of money in purchase of assets contemporaneously with an agreement by an intended payee to take shares is not payment in cash;[4] nor is an arrangement to receive fully-paid shares as the value of advertisements in a newspaper[5] nor the salary of an official.[6] Nor is the crediting of estimated but undivided profits to bonus shares issued by the company payment in cash of such shares.[1]

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[1] *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361.

[2] *Ooregum Gold Mining Co. of India* v. *Roper*, [1892] A.C. 125; *Klenck* v. *East India Co. for Exploration and Mining, Ltd.*, 1888, 16 R. 271.

[3] *Spargo's* case, 1873, L.R. 8 Ch. 407; *Larocque* v. *Beauchemin*, [1897] A.C. 358.

[4] *Arnot's* case, 1887, 36 Ch. D. 702; *Liqr. of Coustonholm Paper Mills Co., Ltd.* v. *Law*, 1891, 18 R. 1076; *Gunn* v. *Muirhead*, 1899, 1 F. 1079.

[5] *White's* case, 1879, 12 Ch. D. 511.

[6] *Liqr. of Pelican Fire and Accident Insurance Co., Ltd.* v. *Bruce*, 1904, 11 S.L.T. 658.

175. The alternative which the legislature offered in the 25th section of the Act of 1867 in lieu of payment in cash was a registered contract duly made in writing. The conditions of such a contract are:[2] (1) there must be, on or before the date of the issue of the shares, a contract;[3] (2) that contract must be duly made in writing; and (3) the contract must be filed with the Registrar. (The allottee of the shares must sign as well as the company.) The contract need not, however, specify the numbers of the shares.[4] The articles of association were not a "contract in writing" within the Act of 1867.[5] Shares subscribed in the memorandum are thereby issued and are not protected by a subsequent contract.[6] The contract to be registered had to be with someone external to the company,[7] but such person might be connected with the company, *e.g.* a director or promoter.[8] The contract also required to shew a consideration for the shares,[7] and adequate consideration.[9] The consideration cannot be *in futuro*.[10] If on the face of the contract the transaction appears a *bona fide* one, the Court will not inquire into the adequacy of the consideration,[11] unless the whole transaction can be impeached,[12] or the alleged consideration is non-existent or a mere blind.[13] It is not sufficient to refer to the consideration as stated in a document not filed.[14] The contract must state the number of shares to be allotted under it, and must do more than give merely an option to take shares instead of cash from the company.[15] A contract for a present consideration to issue an indefinite amount of share capital is not valid.[16]

176. A company may not buy its own shares,[17] although it may return capital to the shareholders by way of reduction of capital under the provisions of the Act of 1908. It may, however, assign uncalled capital on its shares, if so empowered by its memorandum.[18]

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[1] *Liqr. of Scottish Heritages Co.*, 1898, 5 S.L.T., No. 419; see also *Furness & Co.* v. *Liqrs. of Cynthiana Steamship Co., Ltd.*, 1893, 21 R. 239.

[2] See Fry L.J. in *In re New Eberhardt Co.*, 1890, 43 Ch. D. 129.

[3] See *Smith* v. *Brown*, [1896] A.C. 614.

[4] *Forde's* case, 1885, 33 W.R. 839.

[5] Sec. 25; *Pritchard's* case, 1872, L.R. 8 Ch. 956.

[6] *Dalton Time Lock Co.* v. *Dalton*, 1892, 66 L.T. 704; and see *Hartley's* case, 1875, L.R. 10 Ch. 137.

[7] *Crickmer's* case, 1874, L.R. 10 Ch. 614.

[8] *Anderson's* case, 1877, 7 Ch. D. 105.

[9] *In re Addlestone Linoleum Co.*, 1887, 37 Ch. D. 191, at p. 205; *In re Almada and Tirito Co.*, 1888, 38 Ch. D. 425.

[10] *National House Property Investment Co., Ltd.* v. *Watson*, 1908 S.C. 888.

[11] *In re Wragg, Ltd.*, [1897] 1 Ch. 831; *Ooregum Gold Mining Co. of India* v. *Roper*, [1892] A.C. 125, 140.

[12] *Wragg, supra.*

[13] *Eddystone Marine Insurance Co.*, [1893], 3 Ch. 9, as explained in *Wragg, supra*; and see *Bury* v. *Famatina Development Co., Ltd.*, [1909] 1 Ch. 754; [1910] A.C. 439.

[14] *In re Kharaskhoma Exploring and Prospecting Syndicate*, [1897] 2 Ch. 451.

[15] *In re Jackson & Co.*, [1899] 1 Ch. 348.

[16] *Hong-Kong Gas Co.* v. *Glen*, [1914] 1 Ch. 527.

[17] *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409.

[18] *Liqr. of Union Club, Ltd.* v. *Edinburgh Life Assurance Co.*, 1906, 8 F. 1143.

SUBSECTION (2).—*Allotment and Issue.*

(i) *Allotment.*

177. What constitutes a valid application and a valid allotment has already been considered.[1] It has further to be noted that no allotment of share capital offered to the public may be made unless the minimum subscription, if any, fixed by the memorandum and articles and named in the prospectus, or, if none be fixed, the whole amount offered for subscription has been subscribed, and the sum payable on application paid to and received by the company (s. 85 (1)). A similar provision in regard to the minimum and full subscription applies to the first allotment of share capital of a company not inviting the public to subscribe. But it does not apply to a "private company" as defined in the Act (s. 121), nor to a company which has allotted shares or debentures prior to 1st July 1908 (s. 85 (7)). In calculating the minimum subscription only what is payable in cash is to be reckoned (s. 85 (2)). It appears to be sufficient compliance if the minimum subscription, in terms of articles so authorising, is stated to be fixed at so much per cent. of the shares offered.[2] The sum payable on application must be not less than 5 per cent. of the share (s. 85 (3)). A sum payable on application has been held to have been paid to and received by the company when a cheque for the amount has been received and accepted by the company, and payment in cash is of the date of the receipt of the cheque, not of its honouring.[3] In England it has been decided *contra*.[4] If these conditions be not complied with on the expiration of forty days from the issue of the prospectus, the applicants' money is to be returned without interest, and if not repaid within forty-eight days, the directors must repay the money with 5 per cent. interest thereafter (s. 85 (4)). The directors are jointly and severally liable to repay the capital and interest unless loss of the money was not due to any misconduct or negligence on their part (s. 85 (4)).

178. Compliance with these requirements is of the essence of the contract to take shares.[5] These requirements cannot be waived, but, except as to the amount payable on application on each share, they apply only to the first allotment of shares offered to the public (s. 85 (6)). Allotments in contravention of these provisions are voidable at the instance of the applicant for shares, but not of the company,[6] within one month of the holding of the statutory meeting (s. 65), notwithstanding the company may be then in liquidation.[1] If the company was formed before 1st January 1901, there is no limit to the time within which the allottee may exercise his right to rescind.[2] Directors knowingly contravening these provisions are liable to compensate the company and the allottee within two years after the allotment (s. 86).[3] "Knowingly contravene" means contravene in knowledge of the facts upon which the infringement of the law depends.[3]

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[1] *Supra*, para. 140 *et seq.*

[2] *In re West Yorkshire Darracq Agency*, 1908, 25 T.L.R. 77 ; *Roussell* v. *Burnham*, [1909] 1 Ch. 127.

[3] *Glasgow Pavilion, Ltd.* v. *Motherwell*, 1903, 6 F. 116 ; *Leggat Bros.* v. *Gray*, 1908 S.C. 67, per Lord Dunedin at p. 73.

[4] *In re National Motor Mail Coach*, [1908] 2 Ch. 228 ; *Mears* v. *Western Canada, etc. Co.*, [1905] 2 Ch. 353 ; see *Burton* v. *Bevan*, [1908] 2 Ch. 240.

[5] *Finance and Issue, Ltd.* v. *Canadian Produce Corporation, Ltd.*, [1905] 1 Ch. 37.

[6] *Burton* v. *Bevan, supra.*

(ii) *Return of Allotments and Filing Contracts.*

179. Whenever a company limited by shares makes any allotments of its shares, it must within one month thereafter file with the Registrar of Companies (*a*) a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses, and descriptions of the allottees, and the amount, if any, paid or due and payable on each share; and (*b*) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale or for services or other consideration in respect of which the allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they are allotted (s. 88 (1)).[4] Where such a contract is not reduced to writing, the company must, within one month after the allotment, file with the Registrar of Companies the prescribed particulars of the contract, stamped as if the contract had been reduced to writing (s. 88 (2)). Officers of the company knowingly a party to the default are liable to a fine of fifty pounds for every day during which the default continues (s. 88 (3)). Under the Act of 1867 (s. 25), now repealed, the effect of neglect was to render the holder of the shares liable to make payment in cash. This is no longer so.[5] It is possible the Act of 1867, s. 25, and the amending Act of 1898 might still be invoked.[6] The Court may, however, on application by the company or any person liable for the default, make an order extending the time for the filing of the document, if satisfied the omission was accidental or due to inadvertence, or that it is just and equitable to grant relief (s. 88 (3)).[7] This remedy was first given by the Act of 1898.

(iii) *Issue.*

180. A share has been issued only when the shareholder has been put completely in possession of his share,[8] as by the receipt of a share certificate or by being placed on the register of shareholders.[1] A mere resolution to allot may not be sufficient.[1] It is not necessary that a certificate should have been issued.[2] Memorandum shares are issued when the company is registered.[3] The legal result of an *ultra vires* issue of shares is doubtful.[4] Persons to whom an *ultra vires* issue of shares has been made have been held to be creditors of the company for the amount paid on the shares.[5] On the other hand, such persons have been held liable as contributories [6] in some cases.

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[1] *In re National Motor Co.*, [1908] 2 Ch. 228.

[2] *Finance and Issue, Ltd.* v. *Canadian Produce Corporation, supra.*

[3] Sec. 86; *Burton* v. *Bevan*, [1908] 2 Ch. 240.

[4] See *supra*, paras. 174 and 175, as to payment in cash and contract in writing.

[5] See Palmer's Company Law, 12th ed., p. 122.

[6] See *In re Wilkinson Sword Co.*, [1913] W.N. 27.

[7] *Anderson & Munro, Ltd., Petrs.*, 1924, S.L.T. 151.

[8] Buckley, 10th ed., p. 214.

SUBSECTION (3).—*Certificates of Shares.*

181. A share or stock certificate is a solemn affirmation, under the seal of the company, that a certain amount of shares or stock stands in the name of the individual mentioned in the certificate [7] and is *prima facie* evidence of the title of the member to the shares or stock (s. 23). The holder of such a certificate is entitled to the benefit of every presumption created by its possession; but as it is only *prima facie* evidence, an action of reduction is not necessary to set it aside.[8] The holder is open to all exceptions arising from his own conduct or his own knowledge, *e.g.* if he has obtained the issue of the certificate by fraud. But a firm acting in good faith is not barred, by the fact that one of the partners had acted as a director and in good faith signed a certificate in favour of the firm, from maintaining its validity.[9] A company is not liable on a forged certificate. It is not the company's deed.[10]

182. A share or stock certificate is evidence both of title and of payments on shares. The company is barred or estopped from disputing the terms of the certificate. If it bears that the shares are fully paid, an allottee, having adequate ground for believing the shares to be fully paid up,[11] or a transferee acquiring shares in reliance on that representation, cannot be made liable for calls.[12] The doctrine of bar also applies in favour of a nominee of an original allottee.[1] It is different where the transferee, being a director or allottee, knew the true state of the shares; [2] and a transferee with knowledge or notice is in the same position.[3]

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[1] *Clarke's* case, 1878, 8 Ch. D. 635.

[2] *Blyth's* case, 1876, 4 Ch. D. 140; *Att.-Gen.* v. *Regent's Canal and Dock Co.*, [1904] 1 K.B. 263, at p. 270.

[3] *Dalton Time Lock Co.* v. *Dalton*, 1892, 66 L.T. 704.

[4] See Gloag on Contract, p. 148.

[5] *Waverley Hydropathic Co.* v. *Borrowman*, 1895, 23 R. 136; *Klenck* v. *East India Co. for Exploration and Mining, Ltd.*, 1888, 16 R. 271; cf. *National House Property Investment Co.* v. *Watson*, 1908 S.C. 888; *Pellatt's* case, 1867, L.R. 2 Ch. 527.

[6] *Ooregum Gold Mining Co. of India* v. *Roper*, [1892] A.C. 125; *Welton* v. *Saffery*, [1897] A.C. 299, per Lord Macnaghten.

[7] Per Lord Cairns in *Shropshire Union Rlys. and Canal Co.* v. *The Queen*, 1874, L.R. 7 H.L. 496, at p. 509.

[8] *Woodhouse & Rawson* v. *Hosack*, 1894, 2 S.L.T. 279.

[9] *In re Coasters, Ltd.*, [1911] 1 Ch. 86.

[10] Lord Kyllachy in *Clavering, Son & Co.* v. *Goodwins, Jardine & Co.*, 1891, 18 R. 652; *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439.

[11] *Parbury's* case, [1896] 1 Ch. 100; *Bloomenthal* v. *Ford*, [1897] A.C. 156; *Penang Foundry Co., Ltd.* v. *Gardiner*, 1913 S.C. 1203.

[12] *Burkinshaw* v. *Nicolls*, 1878, 3 App. Cas. 1004; *Bloomenthal* v. *Ford*, [1897] A.C. 156; *Scottish Heritages Co.*, 1898, 5 S.L.T., No. 419; *Jamieson* v. *Waterhouse*, 1868, 6 M. 591; 1870, 8 M. (H.L.) 88; *Clavering, Son & Co.* v. *Goodwins, Jardine & Co.*, 1891, 18 R. 652.

183. The certificate itself does not give a title, but certificates are the *indicia* of title which a transferee must have for production to the company before he can get his title perfected by registration.[4] If certificates are not forthcoming on a transfer, their non-production puts the transferee on inquiry and prevents him setting up the title of a buyer for value without notice, for, *e.g.* in England, *non constat* the transferor may not have pledged the certificates.[5] By giving a certificate the company arms the grantee with the power of holding himself out to all the world as the owner of the shares, and a *bona fide* buyer from such grantee may, therefore, under the doctrine of bar or estoppel, maintain an action against the company, not as the real owner of the shares, but as a person whom the company is bound to treat as the real owner.[6] Such a transferee must prove that he relied on the certificate, and not, for example, on a forged transfer.[7]

184. A note by a company upon its share certificates that upon sale or transmission of the shares the certificates must be surrendered with the transfer prior to registration of the transferee and issue of a new certificate may amount to a warranty by the company that it will not register a transfer without requiring production of the share certificate or an explanation of its loss. The note does not amount to an obligation by the company in favour of third parties,[8] although the Court might order registration of a transfer.[9]

A certification or marking "certificate lodged" on the margin of a transfer is a representation that the transferor has produced such documents as shew a *prima facie* title in him to the shares in the transfer. It is not equivalent to a certificate.[10]

185. Every company must within two months after the allotment of any of its shares, debentures, or debenture stock, and within two months after the registration of a transfer thereof, complete and have ready for delivery the certificates unless the conditions of issue otherwise provide; and a penalty for default is imposed on the company and any of its officers knowingly a party to the default (s. 92).

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[1] *Parbury's* case, [1896] 1 Ch. 100.

[2] *In re London Celluloid Co.*, 1888, 39 Ch. D. 190.

[3] *Crickmer's* case, 1874, L.R. 10 Ch. 614; *Furness & Co.* v. *Liqrs. of Cynthiana Steamship Co.*, 1893, 21 R. 239.

[4] *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 426, at p. 437; *Shropshire Union Rlys. and Canal Co.*, *supra*; *In re Bahia and San Francisco Rly. Co.*, 1868, L.R. 3 Q.B. 584, at p. 595; *Burkinshaw* v. *Nicolls*, 1878, 3 App. Cas. 1004.

[5] *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20.

[6] *Simm* v. *Anglo-American Telegraph Co.*, 1879, 5 Q.B.D. 188; *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A.C. 396; *Sheffield Corporation* v. *Barclay*, [1905] A.C. 392.

[7] *Simm*, *supra.*

[8] See *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 426; *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20; *Rainford* v. *James Keith & Blackman Co.*, [1905] 2 Ch. 147; *Waterlow Bros.* v. *Layton*, 1909, 25 T.L.R. 515.

[9] *Colonial Bank*, *supra*, per Lord Blackburn at p. 437.

[10] *Bishop* v. *Balkis Consolidated Co.*, 1890, 25 Q.B.D. 512; *In re Concessions Trust* (*M'Kay's* case), [1896] 2 Ch. 757; *George Whitechurch, Ltd.* v. *Cavanagh*, [1902] A.C. 117; *Longman* v. *Bath Electric Tramways*, [1905] 1 Ch. 646.

The articles of association usually contain provisions dealing with the issue of certificates, including new certificates in case of loss or defacement (Table A, Arts. 6 and 7).

186. In England a valid equitable mortgage of shares or stock may be effected by depositing the certificate relating thereto.[1] In Scots law the creation of equitable rights of pledge or lien by the simple delivery of share certificates is not recognised.[2] But such a pledge or mortgage, if lawfully effected in England and intimated to a Scottish company, is equivalent to a duly intimated assignation.

187. A certificate of shareholding is not subject to stamp duty, but a scrip certificate, or other document entitling any person to become proprietor of any share of any company, is liable to stamp duty of 2d.[3]

SUBSECTION (4).—*Share Warrants to Bearer.*

188. A share certificate is not a negotiable instrument.[4] But a company limited by shares, if authorised by its articles, may, with respect to any fully paid-up shares or stock, issue a warrant stating that the bearer is entitled to the shares or stock therein specified, and may provide by coupons or otherwise for payment of future dividends (s. 37 (1); share warrants were originally introduced by the Act of 1867, s. 27 *et seq.*). The shares or stock specified in the warrant may be transferred by delivery of the warrant (s. 37 (2)). Share warrants to bearer are marketable securities and are treated in mercantile practice as negotiable instruments.[5] The bearer may, if the articles so provide, be deemed a member to the full extent or for purposes defined in the articles, but the warrant cannot qualify the bearer to be a director or manager, where a qualification is required by the articles (s. 37 (4)). The bearer of the warrant is, subject to the articles of the company, entitled, on surrendering it for cancellation, to have his name entered in the register of members; and the company is responsible for loss due to its registering the name of a bearer without the warrant being surrendered and cancelled. The date of the surrender is entered in the register as if it were the date at which a person ceased to be a member (s. 37 (6) (i)). Severe penalties are imposed for forgery, impersonation, and unlawfully engraving plates, etc. (s. 38; see also s. 9 (3) (i)).

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[1] Palmer's Company Law, 12th ed., p. 150; *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201; *Sheffield (Earl of)* v. *London Joint Stock Bank*, 1888, 13 App. Cas. 333; *Fuller* v. *Glyn, Mills, Currie & Co.*, [1914] 2 K.B. 165.

[2] Cf. *Scottish Provident Institution* v. *Cohen & Co.*, 1888, 16 R. 112; *Robertson* v. *British Linen Co.*, 1891, 18 R. 1223; *Union Bank of Scotland* v. *National Bank of Scotland*, 1886, 14 R. (H.L.) 1.

[3] Stamp Act, 1891, s. 79; Finance Act, 1920, s. 35.

[4] *Crouch* v. *Crédit Foncier of England*, 1873, 8 Q.B. 374; *London and County Banking Co.* v. *London and River Plate Bank*, 1887, 20 Q.B.D. 232.

[5] *Webb, Hale & Co.* v. *Alexandrina Water Co.*, 1905, 21 T.L.R. 572.

The stamp duty on the issue of share warrants is three times the amount of duty payable on transfer.[1]

SUBSECTION (5).—*Transfer, Transmission, and Mortgage of Shares.*

(i) *Contract to sell Shares.*

189. The shares or other interest of any member in a company are personal or moveable estate, transferable in manner provided by the articles of the company, and are not of the nature of real estate (s. 22 (11)). The power to transfer may be restricted by the articles, and the articles may also prescribe the mode of transfer.[2] But every shareholder, including directors,[3] has *prima facie* a right to transfer his shares,[4] and may do so at the last moment prior to liquidation, even to a pauper,[5] and compel registration of the transfer,[6] without which the transaction is incomplete.[7]

190. An agreement for the sale of a share obliges the seller, on the one hand, to hand to the transferee a duly executed transfer and the certificate of his title or other equivalent,[8] and that within a reasonable time.[9] And until registration of the transfer the transferor is a trustee of the shares for the transferee.[10] But the agreement for sale does not impliedly bind the seller to procure the registration of the transfer.[11] A buyer of shares, on the other hand, impliedly agrees to indemnify the seller from any calls or liability which may arise in respect of the shares subsequently to the transfer,[12] although it is not clear that registration of the transfer divests the transferor of liability for calls in arrear.[13] Where there is no agreement to the contrary the buyer is entitled, upon a sale, to all dividends declared by the company after the date of his purchase, although the transfer may not be completed or the price paid, and the dividend declared is for a period antecedent to his purchase.[14] Damages for breach of the contract to transfer are measured by the difference between the contract price and the market price at the date of the breach.[1]

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[1] Stamp Act, 1891, as amended by Finance Act, 1920, s. 38.

[2] *Gilbert's* case, 1870, L.R. 5 Ch. 559, at p. 565 ; Table A, Arts. 19 and 20.

[3] *Jessopp's* case, 1857, 2 De G. & J. 649 ; *Gilbert's* case, 1870, L.R. 5 Ch. 559 ; *In re South London Fish Market Co.*, 1888, 39 Ch. D. 324, at p. 331.

[4] *Weston's* case, 1870, L.R. 4 Ch. 20 ; *In re Cawley & Co.*, 1889, 42 Ch. D. 209, 231 ; *In re Bahia and San Francisco Railway Co.*, 1868, L.R. 3 Q.B. 584, at p. 595.

[5] *Re Discoverer's Finance Corporation, Ltd.* ; *Lindlar's* case, [1910] 1 Ch. 207 and 312.

[6] *Hyam's* case, 1859, 1 De G. F. & J. 75 ; *Lindlar's* case, *supra.*

[7] *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20, at p. 28 ; *Shropshire Union Rlys. and Canal Co.* v. *The Queen*, 1874, L.R. 7 H.L. 496.

[8] *Skinner* v. *City of London Marine Insurance Corporation*, 1885, 14 Q.B.D. 882 ; *London Founders' Association* v. *Clarke*, 1888, 20 Q.B.D. 576.

[9] *De Waal* v. *Adler*, 1886, 12 App. Cas. 141.

[10] *Stevenson* v. *Wilson*, 1907 S.C. 445 ; *Hardoon* v. *Belilios*, [1901] A.C. 118.

[11] *Skinner*, *supra* ; *London Founders' Association* v. *Clarke*, *supra*.

[12] *Levi* v. *Ayres*, 1878, 3 App. Cas. 842 ; *Hardoon* v. *Belilios*, [1901] A.C. 118 ; *Spencer* v. *Ashworth, Partington & Co.*, [1925], 1 K.B. 589—a case of a transfer in blank.

[13] *In re Hoylake Rly. Co.*, 1874, L.R. 9 Ch. 257.

[14] *Black* v. *Homersham*, 1878, 4 Ex. D. 24 ; but see Irving on Liferent and Fee, p. 46 *et seq.* It is the universal custom of the Stock Exchange and also a term of the contract that, in a question between buyer and seller, the price includes accruing dividend.

Transferees for onerous causes obtain a statutory title subject to those conditions only which affect the shares themselves, and not to mere personal pleas affecting the transferor.[2]

(ii) *Transfer.*

191. If the articles of a company prescribe a particular course for a shareholder ceasing to be such, he can only cease to be a shareholder by pursuing that course.[3] The form of the transfer depends on the regulations of the company.[4] The regulations must not be too technical.[5] If the articles are silent, the rule as to the form of transfers may be interpreted by the practice of the company.[6] A company registered under the Joint Stock Companies Acts may cause its shares to be transferred in manner in use prior to the Act of 1908, or in such other manner as the company may direct.[7]

The transfer duly executed by the transferor is in practice handed with the certificate to the transferee or his agent. The buyer completes the transfer and lodges it with the company for registration. The transfer may be made by an agent of the registered holder, and if so the company is entitled to call for exhibition of the agent's authority. A transfer by joint holders must be executed by all.[8] Shares in a company domiciled abroad can only be transferred by an instrument effectual by the law of that country.[9]

192. There is no obligation on the transferor to procure registration of the transfer, but the transferee may buy "with registration guaranteed." On a sale of shares according to the custom of the Stock Exchange (making the price payable on the seller handing over a duly executed transfer and the certificate) there is no implied undertaking by the seller that the directors shall accept the buyer as a transferee, and that if they do not accept him the price shall be refunded.[10] The transferee takes the risk, but, if the seller takes no steps to set aside the sale, he is bound to receive the dividends and hand them over to the transferee, being trustee for him.[11] If the transferee fails to perform his duty to get the transfer registered, the transferor may apply to the company to register it,[1] but subject to the same conditions as if the application were made by the transferee (s. 28). The directors may waive an irregularity, *e.g.* non-signature by the transferee.[2]

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[1] *Jamal* v. *Moolla Dawood & Co.*, [1916] 1 A.C. 175.

[2] Per Lord Kinnear in *Edinburgh Northern Tramways Co.* v. *Mann*, 1891, 18 R. 1140, at p. 1151; 20 R. (H.L.) 7.

[3] *Bargate* v. *Shortridge*, 1851, 5 H.L.C. 297, at p. 312; cf. *Neilson* v. *Ayr Race Meetings Syndicate, Ltd.*, 1918, 1 S.L.T. 63.

[4] *Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20.

[5] *Re Letheby & Christopher, Ltd.*; *Jones*' case, [1904] 1 Ch. 815.

[6] *Marino's* case, 1867, L.R. 2 Ch. 596.

[7] See Joint Stock Companies Acts, 1856 (19 & 20 Vict. c. 57), s. 20, Form F, and 1844 (7 & 8 Vict. c. 110), s. 54, Form K.

[8] Palmer's Company Law, 12th ed., p. 137.

[9] *Colonial Bank* v. *Whinney*, 1890, 15 App. Cas. 281.

[10] *London Founders' Association* v. *Clarke*, 1888, 20 Q.B.D. 576; *Ex parte Harrison*, 1885, 28 Ch. D. 363.

[11] *Stevenson* v. *Wilson*, 1907 S.C. 445.

193. The stamp duty on a transfer of shares or stock is £1 per cent. *ad valorem*, including voluntary transfers.[3] There is a duty on a company in its own interest to see that a transfer tendered for registration is properly stamped. The company may refuse registration if it is not,[4] and if it accepts a transfer improperly stamped it cannot afterwards found upon it.[5] The transfer may be validated by payment of the duty and penalty.[6] In the case of transfers *inter vivos* by way of gift adjudication of the stamp appears imperative.[7]

194. If the directors have no discretion in accepting transferees, their function when a transfer is presented is merely ministerial. They are entitled to examine it, and to satisfy themselves that it is in order and the transferee genuine. They are bound to act promptly and according to the usual course of business, and not carelessly or purposely to delay.[8] If a transfer be real, *i.e.* a transfer out and out of all the transferor's interest, it will be upheld, although it be made to a mere pauper and for the avowed purpose of relieving the transferor from any future liability,[9] and even though the transferor be a director.[10] It is the fault of the regulations of the company if they admit of persons becoming shareholders who are of no means.[11] Most companies' articles consequently contain a power to the directors to veto transfers. This power is only available while the company is a going one.[12] Table A (Art. 20) authorises directors to decline to register any transfer of shares not fully paid to a person whom they do not approve, and also any transfer of shares on which the company has a lien. Like other powers of a director, it is a fiduciary one,[13] not to be arbitrarily or capriciously exercised,[14] for so exercised it means confiscation. The directors' duty is, keeping in view the terms in which these powers are expressed, fairly to consider the fitness of a proposed transferee at a Board meeting.[15] If the power to reject is limited to a transfer of shares not fully paid up, this points to the pecuniary responsibility of the transferee as the principal element to be regarded by the Board. A power of refusal to persons of whom the directors do not approve means refusal on grounds personal to the transferee.[1] Directors cannot under such a power veto a transfer because they disapprove of the purpose for which it is made, *e.g.* to multiply votes, if there is no objection to the transferee.[2] A power to refuse a transfer to a bankrupt will not justify refusal to an insolvent.[3] It seems doubtful whether directors of a company could properly refuse to approve a transfer to a nominee of a rival company.[4] A director may approve a transfer to himself.[5] Where directors, in exercise of a power to do so, refuse a transfer in respect of the transferor's indebtedness to the company, the indebtedness must be determined as at the date when the transfer is presented,[6] unless where the shareholder has induced the company to postpone making a call, and has immediately transferred his shares.[7] A mere failure to pass a resolution for registration is not an exercise of the right to decline registration.[8] The registration of a transfer in name of a minor may be challenged by him within the *quadriennium utile.*[9]

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[1] *Skinner* v. *City of London Marine Insurance Corporation*, 1885, 14 Q.B.D. 882.

[2] *Marino's* case, 1867, L.R. 2 Ch. 596.

[3] Stamp Act, 1891 ; Finance Act, 1920, s. 36 ; and see s. 42.

[4] *Maynard* v. *Consolidated Kent Collieries Corporation*, [1903], 2 K.B. 121.

[5] Stamp Act, 1891, s. 14 (4).

[6] *In re Indo-China Steam Navigation Co.*, [1917] 2 Ch. 100.

[7] Finance Act, 1920, s. 36.

[8] *Nation's* case, 1866, L.R. 3 Eq. 77.

[9] *R.* v. *Lambourn Valley Rly. Co.*, 1889, 22 Q.B.D. 406; *Lindlar's* case, [1910] 1 Ch. 207 and 312.

[10] *M'Lintock* v. *Campbell*, 1916 S.C. 966.

[11] *King's* case, 1871, 40 L.J. Ch. 361, at p. 366.

[12] *City of Glasgow Bank*, *Alexander Mitchell's* case, 1879, 4 App. Cas. 573.

[13] *In re Gresham Life Assurance Society*, 1872, L.R. 8 Ch. 446, at p. 449.

[14] *In re Bell Bros., Ltd.*, 1891, 65 L.T. 245; *Hindle* v. *John Cotton, Ltd.*, 1919, 56 S.L.R. 625.

[15] *In re Ceylon Land and Produce Co., Ltd.*, 1893, 7 T.L.R. 692.

195. If the directors have fairly considered the question at a meeting, and there is no evidence to shew that they have acted corruptly or capriciously, the Court will not interfere with their discretion.[10] If they have been actuated by hostility to the transferor, the Court may overrule the rejection.[11] Directors are not bound, in or out of Court, to give their reasons for disapproving a transfer, and no unfavourable inference will be drawn by the Court from their not doing so.[12] But if they choose to give their reasons, the Court will consider whether they are legitimate or not.[13]

Directors may veto a transfer on the ground of misdescription of the transferee, as preventing the directors exercising any real judgment.[14]

196. If directors come to the conclusion that they cannot go on, and must wind up, they should pass a resolution to allow no more transfers.[15] Where by a circular the directors have announced the insolvency of the company, and convened a meeting to pass a winding-up resolution, they are not entitled to pass transfers or alter the register after the issue of the circular.[1] Shares may be transferred after a voluntary winding-up, with the sanction of the liquidator (s. 205 (1)).[2] Alterations on the register made after a stoppage stand, if they fell to be made prior thereto,[3] and names improperly retained on the register may be removed by application for rectification after liquidation in a winding-up by or subject to the supervision of the Court (s. 205 (2), s. 163).[4]

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[1] *In re Bede Steam Shipping Co.*, [1917] 1 Ch. 123.

[2] *Moffatt* v. *Farquhar*, 1877, 7 Ch. D. 591, at p. 605; *Pender* v. *Lushington*, 1877, 6 Ch. D. 70.

[3] *Furness & Co.* v. *Liqrs. of Cynthiana Steamship Co., Ltd.*, 1893, 21 R. 239.

[4] *Robinson* v. *Chartered Bank*, 1865, L.R. 1 Eq. 32.

[5] *Bush's* case, 1870, L.R. 6 Ch. 246, at p. 262.

[6] *In re Cawley & Co.*, 1889, 42 Ch. D. 209.

[7] *Ex parte Parker*, 1867, L.R. 2 Ch. 685.

[8] *In re Hackney Pavilion, Ltd.*, [1924] 1 Ch. 276; cf. *In re Copal Varnish Co.*, [1917] 2 Ch. 349.

[9] *Hill* v. *City of Glasgow Bank*, 1879, 7 R. 68.

[10] *Gresham Life Assurance Society, supra*; *Stewart* v. *Jas. Keiller & Sons*, 1902, 4 F. 657; *Kennedy* v. *North British Wireless Schools, Ltd.*, 1915, 1 S.L.T. 196; 1916, 1 S.L.T. 407.

[11] *In re Ceylon Land and Produce Co., supra.*

[12] *In re Coalport China Co.*, [1895] 2 Ch. 404.

[13] *In re Bell Bros., Ltd.*, 1891, 65 L.T. 245.

[14] *Payne's* case, 1869, L.R. 9 Eq. 223; *Williams'* case, 1869, L.R. 9 Eq. 225 n.; *Roger's* case, 1872, 25 L.T. 406; but see *Master's* case, 1872, L.R. 7 Ch. 292; and Buckley, 10th ed., p. 38 *et seq.*

[15] *Nation's* case, 1866, L.R. 3 Eq. 77; *Lowe's* case, 1869, L.R. 9 Eq. 589, at p. 595.

197. The Forged Transfers Act, 1891, and the amending Act, 1892, were passed "for preserving purchasers of stock from losses by forged transfers." They give power to a company to make compensation by a cash payment out of the company's funds for any loss arising from a transfer of any shares or stock in pursuance of a forged transfer, or of a transfer under a forged power of attorney; and the company may, by a small fee, by insurance, reservation of capital, accumulation of dividends or in any other manner it may resolve upon, form such compensation fund. The company may also borrow for the purpose on the security of its property. It may impose reasonable restrictions on the transfers of shares and powers of attorney to transfer. The company is to be surrogated to any rights of the payee of the compensation. The Acts apply to losses and forgeries before or after 1891.

(iii) *Transmission of Shares.*

198. On the death of a member of a company, his shares, as moveable estate, vest in his executor or other personal representative. The personal representative does not *ipso facto* become a member of the company. The articles may disentitle him to become a member. But in ordinary circumstances the presentation to the company of the confirmation or probate in favour of the executor entitles him to be registered, and if he authorises or afterwards adopts this step, he becomes a shareholder to all effects.[5] If the executor wish to transfer the shares, he is not bound to go upon the register, and may execute a transfer without doing so (Act, s. 29).[6] The confirmation or probate is a sufficient warrant for that.[7] He is entitled to reasonable time for consideration and to find a purchaser, and may in the meantime send in his title to be noted and may draw dividends. How long the executor is entitled to occupy this position is not clear. The articles of the company commonly contain provision authorising the company after a definite time to sell or forfeit the shares. So long as the name of the deceased remains on the register, his estate is liable for all obligations connected with the shares, and the executor distributing the estate without making provision therefor is personally liable.[1] The deceased member's estate is also entitled to the benefits, *e.g.* an allotment of new shares to existing members[2] and to dividend.

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[1] *Nelson Mitchell* v. *City of Glasgow Bank*, 1878, 6 R. 420, (H.L.) 66; *Alex. Mitchell* v. *Do.*, 6 R. 439, (H.L.) 60; *Macdonald* v. *Do.*, 1879, 6 R. 621; *Myles* v. *Do.*, 1879, 6 R. 718; *Dodds* v. *Cosmopolitan Insurance Corporation, Ltd.*, 1915 S.C. 992.

[2] *Benhar Coal Co.*, 1879, 6 R. 706; *In re National Bank of Wales*, [1897] 1 Ch. 298.

[3] *Howe* v. *City of Glasgow Bank*, 1879, 6 R. 1194; *Nation's* case, 1866, L.R. 3 Eq. 77, per Romilly M.R. at p. 82.

[4] *Furness & Co.* v. *Liqrs. of Cynthiana Steamship Co.*, 1893, 21 R. 239; *Liqr. of Florida Mortgage and Investment Co., Ltd.* v. *Bayley*, 1890, 17 R. 525; *Liqr. of Edinburgh Employers' Liability and General Assurance Co.* v. *Griffiths*, 1892, 19 R. 550.

[5] *Buchan* v. *City of Glasgow Bank*, 1879, 6 R. 567, (H.L.) 44; *M'Ewen* v. *Do.*, 1879, 6 R. 1315; *Bell* v. *Do.*, 6 R. (H.L.) 55; *Gordon* v. *Do.*, 7 R. 55.

[6] See *Trotter* v. *British Linen Bank*, 1898, 6 S.L.T. 213.

[7] *Buchan, supra.*

199. If an executor gives express or implied authority to place his name on the register, he becomes a member. Authority to place on the register will be inferred from acting as a shareholder, or from authorising or approving of the purchase of shares, though the transfer was not signed by all of a number of trustees.[3] Parole evidence will be admitted to explain writings bearing on the authority to register.[4] Authority by the executor to the law agent to complete the executor's title is not authority to place him on the register.[5] An executor's authority to place him on the register may be recalled before it has been acted on, and if it has not been acted on before the commencement of liquidation, or before the declared insolvency of the company, it is held recalled, and the entry, if made, can receive no effect.[6] But it is otherwise where there has been a transfer on sale.[7] One of a body of trustees or executors (except the last) ceases, by resignation intimated to the company, or by death without intimation, to be a shareholder.[8]

It is no part of the duty of a trustee in bankruptcy, or of a *curator bonis* for a lunatic, to go upon the register, but their titles may be noted and dividends drawn.[9] But if a trustee in bankruptcy, *curator bonis*, judicial factor, or other officer authorises the company to register the shares in his name, he is liable as a shareholder.[10]

(iv) *Mortgages.*

200. Shares in a company may form a security for loan or other obligations; but to create an effectual security the shares must be transferred to and registered in the name of the lender.[11] In Scotland mere deposit of share certificates creates no security over the shares.[12] If an executed transfer be delivered by the transferor to the transferee (lender), the latter may at once complete his title to the shares by presenting the transfer for registration. He may do so even within sixty days before the borrower's bankruptcy if the arrangement is otherwise unimpeachable,[1] but not if there is merely an arrangement that the borrower shall execute a transfer when desired.[2]

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[1] See *Heritable Securities Investment Association, Ltd.* v. *Miller's Trs.*, 1893, 20 R. 675; *Stewart's Trs.* v. *Evans*, 1871, 9 M. 810.

[2] *James* v. *Buena Ventura Nitrate Grounds Syndicate, Ltd.*, [1896] 1 Ch. 456.

[3] *Roberts* v. *City of Glasgow Bank*, 1878, 6 R. 805; *Ker* v. *Do.*, 1879, 6 R. (H.L.) 52; *Cuninghame* v. *Do.*, 1879, 6 R. (H.L.) 98.

[4] *Stott* v. *City of Glasgow Bank*, 1879, 6 R. 1126; *Gillespie* v. *Do.*, 1879, 6 R. 813.

[5] *Stott* v. *Do.*, *supra*; *Wishart* v. *Do.*, 1879, 6 R. 1341.

[6] *Macdonald* v. *Do.*, 1879, 6 R. 621; *Myles* v. *Do.*, 1879, 6 R. 718.

[7] *Howe* v. *Do.*, 1879, 6 R. 1194; *Stenhouse* v. *Do.*, 1879, 7 R. 102; *Turnbull* v. *Allan & Son*, 1833, 11 S. 487; *Allan* v. *Wright*, 1853, 15 D. 725.

[8] *Oswald, Sinclair, Tochetti, Low's Exrs.* v. *City of Glasgow Bank*, 1879, 6 R. 461, 571, 789, 830.

[9] *Myles*, *supra*; *Lindsay* v. *City of Glasgow Bank*, 1879, 6 R. 671.

[10] *Lumsden* v. *Peddie*, 1866, 5 M. 34.

[11] *Morrison* v. *Harrison*, 1876, 3 R. 406.

[12] *Christie* v. *Ruxton*, 1862, 24 D. 1182; *Robertson* v. *British Linen Co.*, 1891, 18 R. 1225; *Scottish Provident Institution* v. *Cohen & Co.*, 1888, 16 R. 112.

Subsection (6).—*Forfeiture of Shares.*

201. A power to forfeit shares is not inherent in a company.[3] But forfeiture of shares is contemplated by the Act (s. 26), which requires a return of shares forfeited in the annual summary, and provision is made for its regulation in Table A as regards forfeiture for non-payment of calls (Arts. 24–29), and also for the non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share or by way of premium, as if the same had been payable by virtue of a call duly made and notified (Art. 30). It is thought that forfeiture for any other reason, *e.g.* for the purpose of enforcing a lien [4] or for litigating against the company or directors [5] is illegal and *ultra vires*.[6]

202. Power to forfeit must be conferred by the articles as originally framed or as altered by special resolution, and when exercised must strictly conform to the procedure prescribed in the articles.[7] Further, it is a fiduciary power, and must be exercised for the benefit of the company,[8] as the directors in their discretion think expedient.[9] It may be restrained pending an action for rescission of the contract.[10] Forfeiture clauses being for the benefit of the company cannot be founded on by shareholders with a view to evading liability for calls,[11] and the shareholder cannot claim restoration of the shares on tendering payment of the call.[12] If shares are illegally forfeited, the company is liable in damages,[13] but personal bar may operate to prevent an irregular forfeiture being set aside.[14] Power conferred upon the directors in the articles to annul a forfeiture cannot be exercised without the consent of the late holder;[1] and he may make the forfeiture a ground for removal of his name from the register.[2] The power of forfeiture may be exercised by the directors in a voluntary liquidation with the consent of the liquidator (see s. 186 (iii)).[3]

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[1] *Guild* v. *Young*, 1884, 22 S.L.R. 520.

[2] *Gourlay* v. *Mackie*, 1887, 14 R. 403.

[3] *Clarke* v. *Hart*, 1858, 6 H.L.C. 633.

[4] *Hopkinson* v. *Mortimer, Harley & Co.*, [1917] 1 Ch. 646.

[5] *Hope* v. *International Financial Society*, 1876, 4 Ch. D. 327.

[6] *Trevor* v. *Whitworth*, 1886, 12 App. Cas. at p. 417; *Hopkinson*, *supra*; and see *Bellerby* v. *Rowland & Marwood's S.S. Co.*, *supra*; but see *Dunlop* v. *Dunlop*, 1882, 21 Ch. D. 583.

[7] *Clarke* v. *Hart*, *supra*; *Ferguson* v. *Central Halls Co.*, 1881, 8 R. 997; *Johnson* v. *Lyttle's Iron Agency*, 1877, 5 Ch. D. 687; *Garden Gully United Quartz Mining Co.* v. *M'Lister*, 1875, 1 App. Cas. 39.

[8] *Spackman* v. *Evans*, 1868, L.R. 3 H.L. 171, 186; *In re Esparto Trading Co.*, 1879, 12 Ch. D. 191.

[9] *Bigg's* case, 1865, L.R. 1 Eq: 309.

[10] *Jones* v. *Pacaya Rubber and Produce Co.*, [1911] 1 K.B. 455; *Lamb* v. *Sambar Rubber and Gutta Percha Co.*, [1908] 1 Ch. 845.

[11] *Moore* v. *Rawlins*, 1859, 6 C.B. N.S. 289; but see *Liqr. of Irvine and Fullerton Property Investment Society* v. *Cuthbertson*, 1905, 8 F. 1.

[12] *Great Northern Rly. Co.* v. *Clark*, 1856, 18 D. 660.

[13] *In re Catchpole*, 1852, 1 E. & B. 111; *In re New Chile Gold Mining Co.*, 1890, 45 Ch. D. 598.

[14] *Jones* v. *North Vancouver Land and Improvement Co.*, [1910] (P.C.) A.C. 317; 47 S.L.R. 896.

203. As to the effect of forfeiture, the articles almost always provide that, notwithstanding forfeiture, calls due at its date shall be exigible, with interest. Otherwise such calls could not be enforced. If such provision be made, on forfeiture the shareholder ceases to be a member of the company, but is liable on his contract for payment of calls already made as a debtor to the company, not as a contributory.[4] The late shareholder still, however, remains secondarily liable on the shares as a B contributory in the event of a winding-up commencing within a year after he ceased to be a member,[5] as will also prior transferors.[6] After forfeiture he may still repudiate the contract and even after liquidation [7] he may defend an action for calls on the ground that he was induced by fraud [8] to apply for the shares.

204. Forfeiture is a means of getting rid of impecunious shareholders, and puts the company in the position to place the shares in other hands, and so get the balance of capital paid. The articles usually provide that a forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit (Table A, Art. 23), and also for securing an unchallengeable title to the purchaser from the company of forfeited shares (Table A, Art. 29). It seems to be implied, as was expressly provided in Art. 22 to Table A of the Act of 1862, that such a purchaser is "discharged from all calls due prior to" his purchase, but the new certificate may shew that the shares are only partly paid up and he will be liable for all calls made after the date of the certificate, including calls made prior to the reissue of the shares [9] and remaining in whole or part unsatisfied.

SUBSECTION (7).—*Surrender of Shares.*

205. A surrender of shares means a transfer of shares to the company without consideration.[10] There is no reference to the surrender of shares in the Act of 1908, but it is admitted by the Courts on the principle that it has the same effect as forfeiture in regard to impecunious shareholders.[1] But it only exonerates those who have shewn themselves unable to pay.[2] A surrender in return for money would be a sale, however disguised, and involve a reduction of capital.[3] A surrender of fully-paid shares in exchange for equivalent amounts of other shares has been held valid without the sanction of the Court.[4] The competency of this procedure is doubtful.[5] Power to accept surrenders must be conferred by the articles of the company. A valid surrender may base a claim to be removed from the register.[6]

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[1] *Lackworthy's* case, [1903] 1 Ch. 711.

[2] Per Lord Pres. Inglis in *Taylor* v. *Union Heritable Securities Co.*, 1889, 16 R. 711.

[3] *Ladd's* case, [1893] 3 Ch. 450.

[4] *Stocken's* case, 1868 L.R. 3 Ch. 412; *Ladies' Dress Association* v. *Pulbrook*, [1900] 2 Q.B. 376; *Liqr. of Mount Morgan (West) Gold Mines* v. *M'Mahon*, 1891, 18 R. 772; *Aaron's Reefs, Ltd.* v. *Twiss*, [1896] A.C. 273.

[5] Sec. 123; *Marshall* v. *Glamorgan Iron and Coal Co.*, 1868, L.R. 7 Eq. 138; *Creyke's* case, 1869, L.R. 5 Ch. 63.

[6] *Bradger's* and *Neill's* cases, 1869, L.R. 4 Ch. 266.

[7] *Mount Morgan Co.* v. *M'Mahon, supra.*

[8] *Aaron's Reefs, Ltd., supra.*

[9] *New Balkis Eersteling, Ltd.* v. *Randt Gold Mining Co.*, [1904] A.C. 165.

[10] Per Lord M'Laren in *General Property Investment Co.* v. *Craig*, 1891, 18 R. 389.

SECTION 11.—REGULATION AND MANAGEMENT.

SUBSECTION (1).—*In General.*

(i) *Under Table A.*

206. The regulations for the management of the affairs of a company are contained usually in articles of association registered along with the memorandum of association. The Act of 1908 provides that in the case of a company limited by shares and registered after the commencement of the Act, if articles are not registered, or, if articles are registered, in so far as the articles do not exclude or modify the regulations in Table A in the First Schedule to the Act, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles (s. 11).[7] Table A may be adopted with modifications and additions (s. 10 (2)). In the case of a company registered under Part VII. of the Act of 1908 the regulations in Table A of the Act do not apply unless adopted by special resolution (s. 263 (ii) (*a*)). In the case of companies registered before 1st April 1909, Table A of the Companies Act, 1862, continues in force,[8] as does also Table A of the Joint Stock Companies Act, 1856.[9] Having received the express sanction of the Legislature, it cannot be said that any of the articles in Table A are *ultra vires*.[10] But in the case of private companies, if Table A be adopted, the articles dealing with share warrants to bearer (Nos. 35–40 inclusive) must be excluded as being inconsistent with the restriction on transfer of the shares. The Board of Trade has power to alter Table A (s. 118).

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[1] Per Lord Watson in *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409, at p. 429; *Bellerby* v. *Rowland & Marwood's S.S. Co.*, [1902] 2 Ch. 14; *General Property Investment Co.* v. *Craig, supra*; *Gill* v. *Arizona Copper Co.*, 1900, 2 F. 843.

[2] *General Property Investment Co.* v. *Craig, supra.*

[3] Per Lord Macnaghten in *Trevor* v. *Whitworth, supra*; *British American Trustee and Finance Corporation* v. *Couper*, [1894] A.C. 399; *Bellerby* v. *Rowland & Marwood's S.S. Co., supra.*

[4] *Rowell* v. *John Rowell & Sons, Ltd.*, [1912] 2 Ch. 609; *Eichbaum* v. *City of Chicago Grain Elevators, Ltd.*, [1891] 3 Ch. 459.

[5] See *Hope* v. *International Financial Society*, 1876, 4 Ch. D. 327; *Bellerby* v. *Rowland & Marwood's S.S. Co., supra*; Palmer's Company Law, 12th ed., p. 95 *et seq.*

[6] Per Lord Pres. Inglis in *Taylor* v. *Union Heritable Securities Co.*, 1889, 16 R. 711.

[7] From 1st October 1908 there was substituted for Table A by order of the Board of Trade a new Table A.

[8] Act of 1862, s. 15; Act of 1908, s. 286 (1) (*c*).

[9] Act of 1908, s. 285.

[10] See Halsbury L.C. in *Lock* v. *Queensland Investment and Land Mortgage Co.*, [1896] A.C. 461, at p. 466.

(ii) *Under Special Articles.*

207. It is usual to have special articles, but these may adopt Table A in whole or in part (ss. 10 (2), 11). Subject to the terms of the memorandum of association, the company has full power to make and alter such regulations for its own government as it may think fit.[1] The articles are subordinate to and controlled by the memorandum, and any articles which go beyond the company's area of action, as defined in the memorandum and the Acts, are void and incapable of ratification.[2]

(iii) *Alteration of Articles.*

208. Subject to the limitations contained in its memorandum,[3] a company's articles may be altered or added to by special resolution (s. 69). Any alteration or addition so made is as valid as if originally contained in the articles and is likewise subject to alteration (s. 13). It is not competent for the company to except any article from alteration,[4] whether as between the company and its shareholders [5] or as between the company and an outsider,[6] and whether amounting to an alteration affecting the constitution of the company or only the management and administration.[7]

209. A company desirous of doing something not within the articles must first alter the articles so as to acquire the power.[8] It may then exercise the power. It cannot do both simultaneously.[9] An alteration in articles comes into force at the date of the resolution. In questions with third parties, resolutions for the alteration of articles are presumed to have been validly passed as regards all preliminary formalities.[10] An article, however, might be open to exception on the ground of an irregularity in the passing of a resolution in a question between members of the company and the directors.[11] Articles altered but not by special resolution in conformity with the statute have been held binding on the company in a question with a third party, where they were embodied in a contract with that party,[1] and articles registered though not passed by special resolution may by long acquiescence become binding on the company in a question with shareholders and purchasers of shares.[2]

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[1] Per Lord Cairns in *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 1875, L.R. 7 H.L. 653, at p. 671.

[2] *Guinness* v. *Land Corporation of Ireland*, 1882, 22 Ch. D. 349, at p. 376; and see *Gill* v. *Arizona Copper Co.*, 1900, 2 F. 843.

[3] *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 1875, L.R. 7 H.L. 656, at pp. 671, 678.

[4] *Walker* v. *London Tramways Co.*, 1879, 12 Ch. D. 705; *Malleson* v. *National Insurance and Guarantee Corporation*, [1894] 1 Ch. 200.

[5] *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656.

[6] *Punt* v. *Symons & Co.*, [1903] 2 Ch. 506.

[7] *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361.

[8] *Imperial Hydropathic Hotel Co. (Blackpool)* v. *Hampson*, 1882, 23 Ch. D. 1.

[9] *West India and Pacific Steamship Co.*, 1873, L.R. 9 Ch. 11 (n.); *Hippisley's* case, 1873, L.R. 9 Ch. 1; *Patent Invert Sugar Co.*, 1886, 31 Ch. D. 166.

[10] See per Lord M'Laren in *Browns* v. *Kilsyth Police Commrs.*, 1886, 13 R. 515; *Montreal and St. Lawrence Light and Power Co.* v. *Robert*, [1906] A.C. 196; *Heiton* v. *Waverley Hydropathic Co.*, 1879, 4 R. 830.

[11] Per Lord Watson in *Muirhead* v. *Forth and North Sea Steamboat Mutual Insurance Association*, 1893, 20 R. 442; 1894, 21 R. (H.L.) 1, at p. 4.

210. The power to alter must be exercised fairly as well as in accordance with law, and for the benefit of the company as a whole.[3] An alteration is not invalid merely because it may have the effect of prejudicing the rights of a particular shareholder or class of shareholders under the original articles.[4] In general it is no objection to the alteration of articles that the alteration has a retrospective effect.[5] It is, however, unsafe *pendente lite* to alter articles with a view to the alteration having a retrospective effect, for if a right has emerged and been asserted prior to the alteration of the articles the company cannot reduce the right by means of new articles.[6] A company may not alter the articles in breach of contract with a non-member.[7]

211. Articles of Association have statutory operation and cannot be rectified by the Court.[8] Provisions in articles restricting the rights of aliens may not be altered without the consent of the Board of Trade.[9]

SUBSECTION (2).—*Directors.*

(i) *Appointment.*

212. A company must from its very nature act through agents.[10] The persons through whom the company carries on its business and by whom the business is superintended are termed directors. "Director," includes any person occupying the position of director by whatever name called (s. 285). A limited company, if it has the requisite power, may act as a director or as sole director of another company.[11] First directors are usually named in the Articles of Association, or the articles contain provision for their appointment. A person named in the articles as a director cannot be appointed unless before the registration of the articles he has by himself or by his agent authorised in writing signed and filed with the Registrar of Companies a consent to act, and has either signed the memorandum for a number of shares not less than the qualification shares (if any), or signed and filed with the registrar a contract in writing to take from the company and pay for his qualification shares, if any (s. 72).

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[1] *Muirhead, supra.*

[2] *Ho Tung* v. *Man On Insurance Co.*, [1902] A.C. 232.

[3] *Brown* v. *British Abrasive Wheel Co.*, [1919] 1 Ch. 290 ; *Sidebottom* v. *Kershaw, Leese & Co.*, [1920] 1 Ch. 154 ; *Dafen Tinplate Co.* v. *Llanelly Steel Co.*, [1920] 2 Ch. 124 ; *Shuttleworth* v. *Cox Bros. & Co. (Maidenhead), Ltd.*, 1926, 43 T.L.R. 283 ; see Palmer's Company Law, 12th ed., p. 50.

[4] *Crookston* v. *Lindsay, Crookston & Co.*, 1922, S.L.T. 62.

[5] *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656, at p. 672.

[6] *Liqr. of W. & A. M'Arthur, Ltd.* v. *Gulf Line, Ltd.*, 1909 S.C. 732 ; *Moir* v. *Duff & Co.*, 1900, 2 F. 1265.

[7] *Allen, supra* ; *Baily* v. *British Equitable Assurance Co.*, [1904] 1 Ch. 374 ; *British Murac Syndicate, Ltd.* v. *Alperton Rubber Co.*, [1915] 2 Ch. 186.

[8] *Evans* v. *Chapman*, 1902, 86 L.T. 381.

[9] Companies (Foreign Interests) Act, 1917 (7 & 8 Geo. V. c. 18).

[10] *Ferguson* v. *Wilson*, 1866; L.R. 2 Ch. 77, per Lord Cairns at p. 89.

[11] *In re Bulawayo Market and Offices Co.*, [1907] 2 Ch. 458.

213. The articles may provide that the number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the Memorandum of Association (Table A, Art. 68).[1] If nothing is said about a majority all should sign the appointment,[2] or a meeting should be called and, a majority being present, a resolution passed.[3] A majority of those present is competent to make an appointment.[4] Reasonable notice of the meeting must be given. Two days has been held to be sufficient.[5] The subscribers to the memorandum cannot appoint directors until the company is registered,[6] but their power to do so remains in force until an appointment is made [7] of at least a quorum.[8] The articles may give power to a non-member, *e.g.* a vendor, to appoint directors, and if so the company cannot alter its articles so as to deprive him of the power.[9] Failing nomination, and subject to regulations in the articles, directors can be appointed by a meeting of the company convened by not less than five members (s. 67).

214. Directors other than the first directors are elected at the ordinary general meeting of the company in each year, and provision is made therefor, for the filling of casual vacancies occurring through death, resignation, or bankruptcy (Table A, Art. 84),[10] and of vacancies occurring due to the removal of a director (Table A, Art. 86), and for the appointment of additional directors (Table A, Art. 85). The articles may delegate to the directors of the company the appointment of new directors and, if so, the company cannot itself exercise the power,[11] but failing an appointment by the directors, the company may appoint.[12] If the articles prescribe that the election of additional directors shall be by the company in general meeting, a resolution by a general meeting delegating the election of a director to the board of directors is *ultra vires*.[13] A special resolution of the company making the necessary alterations of the articles would be first required.

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[1] Under Art. 53 of Table A of the Act of 1862 until directors were appointed the subscribers of the memorandum were deemed to be directors.

[2] *In re Great Northern Salt and Chemical Works*, 1890, 44 Ch. D. 472; *John Morley Building Co.* v. *Barras*, [1891] 2 Ch. 386.

[3] *In re London and Southern Counties Freehold Land Co.*, 1885, 31 Ch. D. 223.

[4] *York Tramways Co.* v. *Willows*, 1882, 8 Q.B.D. 685; *In re Johannesburg Hotel Co.*, [1891] 1 Ch. 125.

[5] *John Morley Building Co.*, *supra*.

[6] *Möller* v. *Maclean*, 1889, 1 Meg. 274.

[7] *John Morley Building Co.*, *supra*.

[8] *La Compagnie Mayville* v. *Whitley*, [1896] 1 Ch. 788.

[9] *British Murac Syndicate* v. *Alperton Rubber Co.*, [1915] 2 Ch. 186; *Plantation Trust* v. *Bela (Sumatra) Rubber Lands Co.*, 1916, 85 L.J. Ch. 80.

[10] *E.g. York Tramways Co.* v. *Willows*, 1882, 8 Q.B.D. 685.

[11] *Blair Open Hearth Furnace Co.* v. *Reigart*, 1913, 108 L.T. 665.

[12] *Barron* v. *Potter*, [1914] 1 Ch. 895; *Foster* v. *Foster*, [1916] 1 Ch. 532.

[13] *Dunn* v. *Banknock Coal Co.*, 1901, 9 S.L.T. 51.

If any dispute arises as to the propriety of a director's election the proper course is to call a general meeting of the company and get the matter set right.[1] The Court will not compel a company to take a person as managing director whom the company does not desire to act as such.[2] Nor will the Court give effect to an agreement by which one company is to have the right of imposing directors on the shareholders of another company.[3]

(ii) *Qualification.*

215. Directors are under no obligation to take qualification shares under the Companies Acts or the general law.[4] But as a rule articles contain a qualification clause on the principle that a director should have a substantial stake in the company.[5] A qualification clause may or may not apply to directors nominated in the articles. Where the provision in the articles is that no person shall be eligible to or shall continue in the office of director unless he be the holder in his own right[6] of a certain number of shares, the requirement applies only to directors whom the shareholders may subsequently elect, not to the nominated directors.[7]

216. It is the duty of every director who is required to hold a specified share qualification to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the regulations of the company (s. 73 (1)). This provision applies to companies formed before the Act of 1908 as well as to those formed under that Act. Its effect is to create a duty. It has not the effect of a contract. The office must be vacated if within the time required the director has not qualified or if after the expiration of the time he ceases at any time to hold his qualification (s. 73 (2)). If he continues to act without qualification he is liable to a fine of £5 per day (s. 73 (3)), and he will be liable for irregularities as a director notwithstanding he has not the qualification of a *de jure* director.[8] Articles may require that a person elected a director should hold qualification shares at the time of his appointment.[9] A director required to qualify need not take his qualification shares from the company.[10] They may be allotted to him as nominee of a vendor,[11] or he may acquire them by transfer[10] or purchase in the market, but he should not acquire them by way of present from promoters or as trustee for promoters (s. 72 (1) (ii)).[12] The register is conclusive, and it is irrelevant that the director really holds the shares in trust.[1] A joint holding may qualify a director.[2] Share warrants cannot qualify a director (s. 37 (4)).

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[1] *Wandsworth and Putney Gas Light and Coke Co.* v. *Wright*, 1870, 22 L.T. 405.

[2] *Bainbridge* v. *Smith*, 1889, 41 Ch. D. 462, at p. 474.

[3] *James* v. *Eve*, 1873, L.R. 6 H.L. 335.

[4] *De Ruvigne's* case, 1877, 5 Ch. D. 306.

[5] *Archer's* case, [1892] 1 Ch. 322.

[6] See Buckley, 10th ed., p. 174.

[7] *Liqrs. of the Consolidated Copper Co. of Canada* v. *Peddie*, 1877, 5 R. 393.

[8] *Western Bank* v. *Baird's Trs.*, 1872, 11 M. 96.

[9] *Spencer* v. *Kennedy*, [1926] 1 Ch. 125.

[10] *Brown's* case, 1873, L.R. 9 Ch. 102.

[11] *Rutherford Tobacco Co.* v. *Lusby*, 1902, 10 S.L.T. 29.

[12] *In re London and South-Western Canal, Ltd.*, [1911] 1 Ch. 346.

217. To entitle the directors to put a director on the register of shareholders there must be a contract by him to take the qualification shares.[3] The mere acceptance of the office of director, or acting as such, does not constitute a contract to become a member.[4] But acceptance or acting may be evidence from which a contract may be inferred,[5] and where the existing qualification is raised and a director continues to act, he may be put upon the register for the required number of shares.[6] A clause in articles providing that if a director did not acquire his qualification shares within a certain time he should be deemed to have agreed to take the shares from the company was held effective,[7] but its operative effect in view of the terms of the 1908 Act (s. 73 (2)) is now doubtful.[8] If, however, the director resign before the expiry of the time within which he must qualify,[9] or the company is wound up before the time expires, he cannot be put on the register or fixed as a contributory.

(iii) *Remuneration.*

218. The position of a director is not that of a servant but of a managing partner holding a fiduciary relationship to the company.[10] The mere fact of being a director does not entitle him to any remuneration for his services. To recover remuneration he must shew a contract. Otherwise the fees are in the nature of a gratuity voted;[11] the amount is a matter of internal management.[12] Where there is no contract a trading company may do what is ordinarily and reasonably done in such business as it carries on, *i.e.* provided it is within the scope of the company's business and secures advantage to the company.[13] Such fees can be voted only when the company is a going concern and may be for past or future services.[14] If the company be in liquidation a proper sum may be given to directors for their services during the winding up only.[13] The articles may provide for the determination of the remuneration of directors from time to time by the company in general meeting (Table A,

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[1] *Galloway Saloon Steam Packet Co.* v. *Wallace*, 1891, 19 R. 330; and see *M'Jannet* v. *Neilson*, 1894, 2 S.L.T. 388.

[2] *Dunster's case*, [1894] 3 Ch. 475; *Grundy* v. *Briggs*, [1910] 1 Ch. 444.

[3] *Hutchinson's* case, [1895] 1 Ch. 226.

[4] *In re Wheal Buller Consols*, 1888, 38 Ch. D. 42; *Onslow's* case, 1888, 57 L.J. Ch. 388.

[5] *Brown's* case, *supra*; *Ex parte Lord Inchiquin*, [1891] 3 Ch. 28; *In re Hercynia Copper Co.*, [1894] 2 Ch. 403; *Ex parte Cammell*, [1894] 2 Ch. 391; *Dunster's* case, *supra*; *Konratti's* case, 1893, 62 L.J. Ch. 376.

[6] *Molineaux* v. *London, Birmingham and Manchester Insurance Co.*, [1902] 2 K.B. 589.

[7] *Isaac's* case, [1892] 2 Ch. 158.

[8] See Palmer's Company Law, p. 194.

[9] *In re R. Bolton & Co.*, [1894] 3 Ch. 356. See *Kingsburgh Motor Construction Co.* v. *Scott*, 1902, 10 S.L.T. 424.

[10] *M'Naughtan* v. *Brunton*, 1882, 10 R. 111; *Hutton* v. *West York Rly. Co.*, 1883, 23 Ch. D. 654, at p. 672.

[11] *Dunston* v. *The Imperial Gas Light Co.*, 1832, 3 Barn. & Ad. 128; *M'Naughtan*, *supra*.

[12] *Burland* v. *Earle*, [1902] A.C. 83.

[13] *Hutton, supra.*

[14] *Ibid.*; cf. *Fraser* v. *City of Glasgow Bank*, 1880, 7 R. 961.

Art. 69). Commonly the articles fix a remuneration, and if they do so it is an authority to the directors to pay themselves the amount of such fees.[1] A person, however, who acts as a director with articles before him fixing the directors' fees enters into a contract with the company to serve as a director at the rate of remuneration so fixed,[2] and for fees so agreed to be paid he may sue the company [3] and may rank as a creditor in a winding-up. Where the articles fix a minimum sum and entitle the directors to set aside and receive such sum as the company may in general meeting determine, neither a resolution of the company [4] nor an actual setting aside of a sum by the directors [5] is a condition precedent to a valid claim for the minimum sum. A resolution of the directors may by the articles be made a condition precedent of the right to sue for remuneration, and where the division *inter se* is left to their decision there is no obligation to divide equally.[6] Alteration of the remuneration fixed by articles requires a special resolution.[7]

219. A director resigning without preserving a claim for remuneration for past services may be barred from suing the company.[8] Remuneration for past services can only be authorised by a resolution of the company in clear terms.[9] Directors paid for their services are not entitled to expenses incurred by them in travelling to board meetings either as charges incurred in the execution of their office, or under an indemnity clause in the articles.[10] Expenses incurred for the company on a special occasion would be covered by an indemnity clause.[10] If directors improperly pay themselves remuneration they will be ordered to repay it,[11] but it is thought the company can ratify excess payments.[12]

220. There is no rule that directors' fees are to be paid only out of profits.[13] A provision in the articles for the remuneration of directors by a share of profits is limited to profits made while the company is a going concern.[14] It has been held that directors may set off fees due to them against calls due by them, but not so as to give them a preference in a winding-up.[15]

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[1] *Harvey Lewis*' case, 1872, 26 L.T. 673.

[2] *Swabey* v. *Port Darwin Gold Mining Co.*, 1889, 1 Meg. 385.

[3] *Dale* v. *Plant, Ltd.*, 1890, 43 Ch. D. 255.

[4] *Liqrs. of Fife Linoleum and Floorcloth Co.* v. *Lornie*, 1906, 13 S.L.T. 670.

[5] *Ex parte Beckwith*, [1898] 1 Ch. 324 ; *Dale* v. *Plant, Ltd.*, *supra.*

[6] *Morrell* v. *Oxford Portland Cement Co.*, 1910, 26 T.L.R. 682 ; *Joseph* v. *Sonora (Mexico) Land Co.*, 1918, 34 T.L.R. 220.

[7] *Boschoek Proprietary Co.* v. *Fuke*, [1906] 1 Ch. 148, at p. 163.

[8] *Kemsley* v. *Buffel's Land and Mining Co.*, 1897, 5 S.L.T. 165.

[9] *London Gigantic Wheel Co.*, 1908, 24 T.L.R. 618.

[10] *Marmor, Ltd.* v. *Alexander*, 1908 S.C. 78 ; *Young* v. *Naval, etc. Co-operative Society of South Africa*, [1905] 1 K.B. 687.

[11] *Leeds Estate Co.* v. *Shepherd*, 1892, 36 Ch. D. 787, at p. 808 ; and see *Re Whitehall Court, Ltd.*, 1887, 56 L.T. 280 ; *Wood's Ship's Woodite Protection Co.*, 1890, 2 Meg. 164.

[12] See Palmer's Company Law, p. 196 ; *George Newman & Co.*, [1895] 1 Ch. 674.

[31] *Harvey Lewis*' case, *supra.*

[14] *Frames* v. *Bultfontein Mining Co.*, [1891] 1 Ch. 140.

[15] See *Sykes*' case, 1871, L.R. 3 Eq. 255 ; *In re Washington Diamond River Co.*, [1893] 3 Ch. 95.

221. The right to remuneration ceases as from the time when a director ought to have vacated office under the provisions of the articles.[1] An agreement by a director to forgo fees will be enforced.[2] Where a director vacates office before the end of a term for which by the articles his remuneration is fixed, a question of apportionment arises. It has been held there can be no apportionment in respect of an incomplete year.[3] Where the remuneration is payable "at the rate of," apportionment is clearly applicable.

(iv) *Powers and Duties.*

222. Directors are described sometimes as agents, sometimes as trustees, sometimes as managing partners. But each of these expressions is used, not as exhaustive of their powers or responsibilities, but as indicating points of view from which they may for the moment and for the particular purpose be considered.[4] The company is not bound by acts done by the directors for objects which the company has no power to entertain.[2] These are the only acts which, if done by the directors, are *ipso facto* void. The company is, however, bound not only by acts of the directors which are within the scope of their authority, but also by acts, however irregular, which belong to a class of acts which is authorised by the constitution of the company, when done with strangers who transact *bona fide* with the company.[5] When done with the shareholders of the company, such acts are voidable only,[6] and may be ratified by the shareholders in general meeting.[7] The general authority of the directors acting as a board extends to all acts reasonably necessary for management, *e.g.* to give the company's servants a gratuity out of profits in a prosperous year,[8] or a pension to the family of a deceased servant.[9] The powers of directors under the articles are usually of the widest description (Table A, Art. 71), to the effect that they may exercise all the powers of the company except such as are required to be exercised by the company in general meeting; and particular powers are frequently made the subject of express provision, *e.g.* borrowing (Table A, Art. 73) or payment of preliminary expenses (Table A, Art. 71). The articles may put the powers of the directors beyond the control of an ordinary resolution of the company, and the articles would first require to be altered by special resolution to give the company control.[1] The acts of *de facto* directors, whose authority is in reality defective, may be binding on the company if done before the invalidity of their appointment is shewn.[2]

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[1] *In re Consolidated Nickel Mines, Ltd.*, [1914] 1 Ch. 883.

[2] *West Yorkshire Darracq Agency, Ltd.* v. *Coleridge*, [1911] 2 K.B. 326.

[3] *Liqrs. of Fife Linoleum and Floorcloth Co.* v. *Lornie*, 1906, 13 S.L.T. 670; but see Palmer's Company Law, 12th ed., p. 196 *et seq.*

[4] Per Bowen L.J. in *Imperial Hydropathic Hotel Co. (Blackpool)* v. *Hampson*, 1882, 23 Ch. D. 1, at p. 12.

[5] *Heiton* v. *Waverley Hydropathic Co.*, 1877, 4 R. 830; *Browns* v. *Kilsyth Police Commissioners*, 1886, 13 R. 515; *Allison* v. *Scotia Motor and Engineering Co.*, 1906, 14 S.L.T. 9; *Mahony* v. *E. Holyford Mining Co.*, 1875, L.R. 7 H.L. 869, 893; *Royal British Bank* v. *Turquand*, 1857, 6 El. & Bl. 327.

[6] See Romilly M.R. in *Spackman* v. *Evans*, 1869, L.R. 3 H.L. 171, at p. 224

[7] *Grant* v. *United Kingdom Switchback Rlys. Co.*, 1888, 40 Ch. D. 135; *Parker & Cooper, Ltd.* v. *Rankine*, [1926] 1 Ch. 975; *Rixon* v. *Edinburgh Northern Tramways Co.*, 1890, 18 R. 264; *Parker & Cooper, Ltd., supra.*

[8] *Hampson* v. *Price's Patent Candle Co.*, 1876, 34 L.T. 711; *Hutton* v. *West York Rly. Co.*, 1883, 25 Ch. D. 654.

[9] *Henderson* v. *Bank of Australasia*, 1888, 40 Ch. D. 170; but see *Fraser* v. *City of Glasgow Bank*, 1880, 7 R. 961.

223. Directors are in a qualified sense [3] trustees of their powers for the company, [4] but not for individual shareholders [5] nor for the company's creditors.[6] They must exercise them for the benefit of the company, and not to promote their own private interests [7] nor for a different purpose than that for which the power is conferred.[8] If the directors keep within their powers or having a discretion act in the *bona fide* exercise of it,[9] the Court will not interfere. Even if the matter be beyond the powers of the directors, still, if it be within the powers of the company the Court will not interfere, but will leave the objecting shareholder to submit it to the domestic tribunal of the company, viz. a meeting of shareholders, who have power to ratify or adopt what the directors have done,[10] even where fraud by the directors on the company is alleged.[11] The transaction challenged will be upset only if the majority support the challenge or if the minority supporting it are overborne by a majority interested or implicated in the transaction.[12] But the Court will interfere at the suit of a minority, however small, if the acts of the directors are *ultra vires* of the company,[13] and will grant an injunction or exact an undertaking to prevent directors acting *ultra vires* before the company can meet if their so acting will be likely to do serious harm.[14]

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[1] *Automatic Self-cleaning Filter Syndicate Co., Ltd.* v. *Cuninghame*, [1906] 2 Ch. 34; *Gramophone and Typewriter Co., Ltd.* v. *Stanley*, [1908] 2 K.B. 89; *Salmon* v. *Quin & Axtens, Ltd.*, [1909] 1 Ch. 311.

[2] *British Asbestos Co.* v. *Boyd*, [1903] 2 Ch. 439; *In re Branksea Island Co.*, 1890, 1 Meg. 12; *Dawson* v. *African Consolidated Land and Trading Co.*, [1898] 1 Ch. 6.

[3] *In re Forest of Dean Coal Mining Co.*, 1878, 10 Ch. D. 450; *In re Faure Electric Accumulator Co.*, 1888, 40 Ch. D. 141.

[4] See opinion of Kay J. in *In re Faure Electric Accumulator Co., supra.*

[5] *Percival* v. *Wright*, [1902] 2 Ch. 424.

[6] *Poole's* case, 1878, 9 Ch. D. 328; *quære dictum* of Romilly M.R. in *Gaslight International Co.* v. *Tarrell*, 1870, L.R. 10 Eq. 168, at p. 175. See Buckley, 10th ed., p. 579.

[7] *Aberdeen Rly. Co.* v. *Blaikie*, 1851, 1 Macq. 461; *Victors, Ltd.* v. *Lingards*, [1927] 1 Ch. 323.

[8] *Bennett's* case, 1855, 5 De G. M. & G. 297; *Richmond's* case, 1858, 4 K. & J. 305 (power to forfeit shares); *Gilbert's* case, 1870, L.R. 5 Ch. 559; *Alexander* v. *Automatic Telephone Co.*, [1900] 2 Ch. 56 (to make calls); *Re Gresham Life Assurance Society*, 1872, L.R. 8 Ch. 446 (to refuse to register transfer); *Punt* v. *Symons & Co.*, [1903] 2 Ch. 506; *Cook* v. *Barry, Henry & Cook, Ltd.*, 1923, S.L.T. 692 (to issue shares); *Piercy* v. *S. Mills & Co.*, [1920] 1 Ch. 77; *Clark* v. *Workman*, [1920] 1 I.R. 107—as noted in Palmer's Company Law, 12th ed., p. 201.

[9] *Gresham Life Assurance Society*, *supra*, at p. 449.

[10] *Foss* v. *Harbottle*, 1834, 2 Hare 461; *Orr* v. *Glasgow, etc. Rly. Co.*, 1860, 3 Macq. 799.

[11] *Lee* v. *Crawford*, 1890, 17 R. 1094.

[12] *Brown* v. *Stewart*, 1898, 1 F. 316; *Hannay* v. *Muir*, 1898, 1 F. 306.

[13] *Burland* v. *Earle*, [1902] A.C. 83.

[14] *Harben* v. *Phillips*, 1883, 23 Ch. D. 32.

224. In ascertaining the duties of a director it is necessary to consider the nature of the company's business and the manner in which the work of the company is, reasonably in the circumstances and consistently with the articles of association, distributed between the directors and the other officials of the company.[1] Directors, being agents, cannot, unless expressly empowered to do so, delegate their authority, except that they may do so to a large extent to a managing director.[2] Authority to a managing director to borrow will not be implied.[3]

(v) *Liabilities.*

225. In relation to matters affecting third parties the general principles of the law of principal and agent regulate the relations of the company and its directors.[4] Hence, where they contract in name of or ostensibly on behalf of the company, the company alone is liable on the contract unless the directors undertook personal liability, *e.g.* by contracting for the company without using the word "limited" as part of its name (see 63 (3)).[5] Directors may incur personal liability from the manner in which they subscribe a bill or note although the intention was that the company alone should be liable.[6] Directors will also incur personal liability if they have acted without or in excess of their authority as having warranted their authority,[7] *e.g.* to borrow,[8] unless where their authority depends on a question of law and they act in the mistaken belief that they have authority.[9] Where directors act as agents for the company without disclosing the fact, third parties on discovering the principal may sue the company, and like other principals a company may ratify the unauthorised acts of its directors.[10] Directors are not personally liable, merely from the fact of being directors, for the acts of a company.[11]

226. A director who, while acting for the company, is guilty of fraud or delict in relation to the company's affairs, is personally liable for the consequences as well as the company.[12] But a director cannot be held liable for being defrauded, *e.g.* by a co-director,[13] though if a fraudulent act is being done by his co-directors it is not enough for him to protest.[1] Liability will attach to him if he had notice of the fraud.[2] A director may be personally liable in damages for failure to comply with the requirements of the Companies Acts, *e.g.* for misrepresentations in a prospectus.[3]

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[1] *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407.

[2] *E.g. Allison* v. *Scotia Motor and Engineering Co.*, 1906, 14 S.L.T. 9.

[3] *Ross, Skolfield & Co.* v. *State Line Steamship Co.*, 1875, 3 R. 134.

[4] *Ferguson* v. *Wilson*, 1866, L.R. 2 Ch. 77.

[5] *Dermaline Co.* v. *Ashworth*, 1905, 21 T.L.R. 510.

[6] *Chapman* v. *Smethurst*, [1909] 1 K.B. 927; *Brebner* v. *Henderson*, 1925 S.C. 645; *Elliott* v. *Bax-Ironside*, [1925] 2 K.B. 301.

[7] *Collen* v. *Wright*, 1857, 8 E. & B. 647.

[8] *Firbank's Exrs.* v. *Humphreys*, 1886, 18 Q.B.D. 54.

[9] *Rashdall* v. *Ford*, 1866, L.R. 2 Eq. 750.

[10] *Grant* v. *United Kingdom Switchback Rlys. Co.*, 1888, 40 Ch. D. 135.

[11] *Wilson* v. *Dunlop, Bremner & Co., Ltd.*, 1921, 1 S.L.T. 352.

[12] *Cullen* v. *Thomson's Trs.*, 1862, 4 Macq. 424, 432; *National Exchange Co. of Glasgow* v. *Drew*, 1855, 2 Macq. 103; *New Brunswick and Canada Rly. Co.* v. *Conybeare*, 1862, 9 H.L.C. 711; *Barwick* v. *English Joint Stock Bank*, 1866, L.R. 2 Ex. 259.

[13] *Cargill* v. *Bower*, 1878, 10 Ch. D. 502; *Inglis* v. *Douglas*, 1861, 23 D. 561; *Thomson & Co.* v. *Pattison, Elder & Co.*, 1896, 22 R. 432; *Land Credit Co. of Ireland* v. *Lord Fermoy*, 1870, L.R. 5 Ch. 763, at p. 772; *Dovey* v. *Cory*, [1901] A.C. 477; *Prefontaine* v. *Grenier*, [1907] A.C. 101.

227. Directors may further incur personal liability for loss due to their negligence in the conduct of the company's affairs. They are bound to act honestly, and to use fair and reasonable diligence in the discharge of their duties, but they are not bound to do more.[4] The law requires of a trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs. Indeed directors have a wider discretion, being managing partners of a business and not mere trustees of funds.[5] They are not liable for a mere error of judgment.[6] Directors are, however, liable for gross negligence,[7] and they must exercise their judgment.[8] They are entitled in administering the affairs of the company to rely upon information furnished to them by the proper officers of the company and are not bound, in the absence of grounds of suspicion, to make personal investigation into its books and accounts.[9] A director is entitled to assume that a cheque placed before him for signature in the regular way, having regard to the usual practice of the company, is drawn for a legitimate purpose, and that the money is required and will be applied for that purpose. But he should satisfy himself that a resolution of the Board has been passed authorising the signature of the cheque, or obtain confirmation of the Board at its next meeting.[10] Each director has a duty to see that the company's moneys are from time to time in a proper state of investment, except so far as the articles may justify him in delegating that duty to others.[10] A director is not bound to attend every board meeting unless the articles otherwise provide,[11] but he ought to attend when reasonably able to do so.[1] In determining whether a director has been guilty of negligence, the Court will take into account the character of the business, the number of the directors, the provisions of the articles, the ordinary course of management and practice of the directors, the extent of their knowledge and experience, and generally all the circumstances of the case.[2]

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[1] *Joint Stock Discount Co.* v. *Brown*, 1869, L.R. 8 Eq. 381; *Ramskill* v. *Edwards*, 1886, 31 Ch. D. 100.

[2] *Ashhurst* v. *Mason*, 1875, L.R. 20 Eq. 225; *In re Reese River Silver Mining Co.*, 1867, W.N. 139.

[3] See *supra*, Prospectus.

[4] Per Jessel M.R. in *In re Forest of Dean Coal Mining Co.*, 1878, 10 Ch. D. 452; *In re City Equitable Life Insurance Co.*, [1925] 1 Ch. 407; *In re City Equitable Fire Assurance Co., supra.*

[5] Per Jessel M.R. in *In re Forest of Dean Coal Mining Co., supra.*

[6] *Turquand* v. *Marshall*, 1868, L.R. 4 Ch. 386; *Grimwade* v. *Mutual Society*, 1884, 52 L.T. 409; *London Financial Association* v. *Kelk*, 1884, 26 Ch. D. 107, at p. 146; *Overend & Gurney Co.* v. *Gibb*, 1872, L.R. 5 H.L. 480; *Liqrs. of City of Glasgow Bank* v. *Mackinnon*, 1882, 9 R. 535; *In re Faure Electric Accumulator Co.*, 1888, 40 Ch. D. 141; *In re City Equitable Fire Assurance Co., supra.*

[7] See Palmer's Company Law, p. 214, as to meaning of the phrase.

[8] *In re New Mashonaland Exploration Co.*, [1892] 3 Ch. 577; *Leeds Estate Building and Investment Co.* v. *Shepherd*, 1887, 36 Ch. D. 787.

[9] Per L. J.-C. Inglis in *Dobbie* v. *Directors of Edinburgh and Glasgow Bank*, Irvine Smith's Report, p. 330; Lord Pres. Colonsay in *Addie* v. *Western Bank*, 1865, 3 M. 899, at p. 901; *Lees* v. *Tod*, 1882, 9 R. 807; *Dovey* v. *Cory*, [1901] A.C. 477.

[10] *In re City Equitable Fire Assurance Co., supra.*

[11] *Marquis of Bute's* case, [1892] 2 Ch. 100.

228. In addition to his liability on the ground of negligence a director may be personally liable for acts of breach of trust or misfeasance. Misfeasance is a term of English law used in the Act of 1908 (s. 215) and adopted into Scots law. The term "breach of trust" is generally confined to some misapplication of the funds of a company: the term "misfeasance" to other breaches of duty which do not involve such misapplication.[3] Thus directors are liable where loss arises from culpable neglect of duty or wilful default, including fraud, or from their acting beyond, or in violation of, their powers.[4] An act or an omission to do an act is wilful where the person who acts or omits to act knows what he is doing and intends to do it. If the act or omission amounts to a breach of that person's duty, he is not guilty of wilful neglect or default unless he knows that he is committing, and intends to commit, a breach of his duty, or is reckless in the sense of not caring whether his act or omission is or is not a breach of his duty.[5] If party to a breach of trust or misfeasance the liability of directors is joint and several.[6] In cases of misfeasance or breach of trust, a director has no right of set-off.[7]

229. The most common form of misfeasance or breach of trust is misapplication of the funds of the company. If directors apply the funds of the company to *ultra vires* purposes they are liable to replace them,[8] even although they have acted honestly, though mistakenly,[9] or in ignorance of the purposes for which the money was meant to be applied,[10] *e.g.* in signing cheques.[11] They may, however, be relieved of liability by the Court.[12] Thus directors are liable if they pay dividends out of capital.[1] If directors declare a dividend or bonus, relying on a balance-sheet *bona fide* made out with proper assistance, the Court will not, without strong reasons, declare the dividend improper.[2] They may employ accountants and actuaries, but they must still exercise their judgment as business men upon the balance-sheets and estimates submitted to them.[3]

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[1] *In re City Equitable Fire Assurance Co., supra; Re Denham & Co.*, 1883, 25 Ch. D. 752.

[2] See *Dovey* v. *Cory, supra; In re City Equitable Fire Assurance Co., supra.*

[3] Palmer's Company Law, 218; and see *In re Kingston Cotton Mill Co., Ltd.*, [1896] 2 Ch. 279, at p. 291.

[4] *Tulloch* v. *Davidson*, 1858, 20 D. 1045; 3 Macq. 783; *Western Bank of Scotland* v. *Douglas*, 1860, 22 D. 447; *Do.* v. *Baird's Trs.*, 1866, 4 M. 1071; 1872, 11 M. 96; *Caledonian Heritable Security Co.* v. *Curror's Trs.*, 1882, 9 R. 1115.

[5] *In re City Equitable Fire Assurance Co., supra.*

[6] *Ashurst* v. *Mason*, 1875, L.R. 20 Eq. 225; *In re Anglo-French Co-operative Society*, 1882, 21 Ch. D. 501; *Brenes & Co.* v. *Downie*, 1914 S.C. 97; *In re London and South-Western Canal, Ltd.*, [1911] 1 Ch. 346.

[7] *Flitcroft's* case, 1882, 21 Ch. D. 519; *In re Carriage Co-operative Supply Association*, 1884, 27 Ch. D. 322.

[8] *Hirsche* v. *Sims*, [1894] A.C. 654; and see *Maxton* v. *Brown*, 1839, 1 D. 367.

[9] *Cullerne* v. *London, etc. Permanent Building Society*, 1890, 25 Q.B.D. 485; *In re Liverpool Household Stores Association, Ltd.*, 1890, 59 L.J. Ch. 616.

[10] *Land Credit Co. of Ireland* v. *Lord Fermoy*, 1869, L.R. 8 Eq. 7, at p. 12; *In re National Funds Assurance Co.*, 1878, 10 Ch. D. 118, at p. 128.

[11] *Joint Stock Discount Co.* v. *Brown*, 1869, L.R. 8 Eq. 381, and see *Marzetti's* case, 1880, 28 W.R. 541.

[12] See para. 232, *infra.*

230. Again, a director's duty and his interest must not conflict.[4] He is liable to the company for any secret profits made by him.[5] Thus he may not accept a retaining fee from a vendor, promoter, or other person with an adverse interest,[6] or a secret present,[7] or obtain his qualification shares by way of present from a vendor.[8] The transaction must be open and known to all the shareholders as capable of being ratified, and actually ratified by them.[9] If the articles sanction the director making a profit on a contract with the company provided he declares his interest, he must state the nature of his interest.[10] And if he sell to or purchase from the company secretly through a third party, he will be liable for any loss suffered by the company,[11] or the company may on the fact coming to its knowledge rescind or ratify the contract at its option, even if he is merely a shareholder in a company trading with the company and the former has notice of the facts.[12]

231. Apart from the ordinary right of indemnity which directors have as agents, the articles may provide that they shall not be liable for loss sustained by the company through their negligence or breach of duty. Such a provision is legal and is effective so long as the loss is not attributable to their fraud or dishonesty.[1]

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[1] *Flitcroft's* case, 1882, 21 Ch. D. 519; *In re Denham & Co.*, 1883, 25 Ch. D. 752; *City of Glasgow Bank* v. *Mackinnon*, 9 R. 535; *Oxford Benefit Building and Investment Society*, 1886, 35 Ch. D. 502; *Municipal Freehold Land Co., Ltd.* v. *Pollington*, 1890, 63 L.T. 238; *National Funds Assurance Co., supra*; *Lee* v. *Neuchatel Asphalt Co.*, 1889, 41 Ch. D. 1; *Re Sharpe*, [1892] 1 Ch. 154; *London and General Bank* (2), [1895] 2 Ch. 673.

[2] *Stringer's* case, 1869, L.R. 4 Ch. 475; *Rance's* case, 1870, L.R. 6 Ch. 104.

[3] *Leeds Estate Building and Investment Co.* v. *Shepherd*, 1887, 36 Ch. D. 787, and see Palmer's Company Law, 12th ed., p. 218, for other cases of misfeasance and breach of trust.

[4] *Aberdeen Rly. Co.* v. *Blaikie*, 1851, 1 Macq. 461; *Bray* v. *Ford*, [1896] A.C. 44, at p. 50; *Parker* v. *M'Kenna*, 1874, L.R. 10 Ch. 96.

[5] *Hay's* case, 1875, L.R. 10 Ch. 593; *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, 1888, 39 Ch. D. 339; *Parker* v. *M'Kenna, supra*; *Jubilee Cotton Mills, Ltd.* v. *Lewis*, [1924] A.C. 258.

[6] *Benson* v. *Heatham*, 1842, 1 Y. & C.C. 326.

[7] *Huntington Copper Co.* v. *Henderson*, 1877, 4 R. 294; *Scottish Pacific Coast Mining Co.* v. *Falkner, Bell & Co.*, 1888, 15 R. 290; *Edinburgh Northern Tramways Co.* v. *Mann*, 1892, 20 R. (H.L.) 7; *Pearson's* case, 1877, 5 Ch. D. 336; *M'Kay's* case, 1875, 2 Ch. D. 1; *Carling's* case, 1875, 1 Ch. D. 115; *Nant-y-glo and Blaina Iron Works Co.* v. *Grave*, 1878, 12 Ch. D. 738; *George Newman & Co.*, [1895] 1 Ch. 685; *Postage Stamp Automatic Delivery Co.*, [1892] 3 Ch. 566.

[8] *De Ruvigne's* case, 1877, 5 Ch. D. 306; *Pearson's* case, *supra*; *Carriage Co-operative Supply Association*, 1884, 27 Ch. D. 322; *Archer's* case, [1892] 1 Ch. 346.

[9] *In re British Seamless Paper Box Co.*, 1881, 17 Ch. D. 467; *In re George Newman & Co.*, [1895], 1 Ch. 674; *Parker & Cooper, Ltd.* v. *Reading*, [1926] 1 Ch. 975.

[10] *Liqrs. of Imperial Mercantile Credit Association* v. *Coleman*, 1874, L.R. 6 H.L. 198; *Turnbull* v. *West Riding Athletic Club (Leeds)*, [1894] W.N. 4.

[11] *Bentinck* v. *Fenn*, 1887, 12 App. Cas. 652; *Leeds and Hanley, etc. Co.*, [1902] 2 Ch. 809.

[12] *In re Cape Breton Co.*, 1885, 29 Ch. D. 795; affd. *sub. nom. Bentinck* v. *Fenn*, 1887, 12 App. Cas. 652; *North-West Transportation Co.* v. *Beatty*, 1887, 12 App. Cas. 589; *Transvaal Lands Co.* v. *New Belgium, etc. Co.*, [1914] 2 Ch. 488.

232. The Act of 1908 makes special provision for the relief in certain circumstances of directors sued for negligence or breach of trust (s. 279). If the director sued has in the opinion of the Court acted honestly and reasonably and ought fairly to be excused for the negligence or breach of trust, the Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think proper. It must be proved both that he acted honestly and reasonably and that he ought fairly to be excused.[2] The section covers *ultra vires* acts.[3] Payments made or transactions entered into by directors of a going business pending a winding-up order being made will be upheld if made honestly and in the ordinary course of business. But otherwise directors who dispose of the company's property pending a winding-up petition are liable on a winding-up for all moneys so expended by them (s. 205).[4]

233. The ordinary remedy of the company against directors under liability to it is by action, but the Act of 1908 (s. 215) gives summary power to the Court to order any director or officer who has been guilty of misfeasance or breach of trust to replace the moneys misapplied or to pay compensation.[5] The liability of directors does not terminate when the company is struck off the register as defunct (s. 242).

234. The Act of 1908 imposes penalties upon directors and others for default in complying with its provisions.[6] Directors may render themselves criminally liable and subject to prosecution under several sections of the Statute of 1908 (ss. 216, 217, 276, 281). The Court may, in a winding-up by or subject to the supervision of the Court (s. 217 (1)), and in a voluntary winding-up, direct the liquidator to prosecute directors and others.[7] The Court has refused to do so where the funds were small and the creditors opposed,[8] but the creditors' opposition must be *bona fide*.[9] In Scotland the Court would, if it thought fit, direct the papers to be laid before the Lord Advocate, or the liquidator could do so at his own hand.

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[1] *In re Brazilian Rubber Plantations and Estates*, [1911] 1 Ch. 425; but see *Wilson* v. *Guthrie, Smith and Ors.*, 1894, 2 S.L.T. 338, where the decision of Lord Stormonth-Darling was reclaimed and the claim compromised.

[2] *National Trustee Co. of Australasia* v. *General Finance Co. of Australasia*, [1905] A.C. (P.C.) 373; *In re City Equitable Fire Insurance Co., supra.*

[3] *Re Claridge's Patent Asphalte Co.*, [1921] 1 Ch. 543.

[4] Palmer's Company Law, 12th ed., p. 220.

[5] See *Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279, 291; *Bentinck* v. *Fenn*, 1887, 12 App. Cas. 652; *Stringer's* case, 1869, L.R. 4 Ch. 475.

[6] See ss. 25, 26, 30, 41, 44, 63, 64, 70, 75, 88, 92, 99, 100, 101, 113 (4), and 281; and also under the Companies (Particulars as to Directors) Act, 1917 (7 & 8 Geo. V. c. 28).

[7] *E.g. London and Globe Financial Corporation*, [1903] 1 Ch. 728.

[8] *In re Eupion Fuel and Gas Co.*, 1875, W.N. 10; *In re Northern Counties Bank*, 1883, 31 W.R. 546.

[9] *Charles Denham & Co.*, 1884, 32 W.R. 970.

(vi) *Meetings of Directors.*

235. Whatever authority is given by shareholders to directors is given to them as a body and not to each of them individually.[1] The directors are to bind the company only when acting as a board.[2] It follows that every director who is within reach must have notice of every meeting of the board.[3] Unless so provided in the articles, notice need not be given of the special business to be transacted at the meeting.[4]

236. Unless the articles provide for a quorum all the directors or all who usually act must do so, but they may act by a majority.[5] The quorum may be one.[6] A director who is not entitled to vote on a matter cannot form one of a quorum.[7] The articles usually regulate the holding of meetings of directors (Table A, Arts. 87–94), and provide for their being able to act notwithstanding vacancies on the board and the consequent want of a quorum.[8] If a meeting be irregularly held, business transacted at it is *prima facie* invalid,[9] but if a contract be made with an outsider, the company may be bound, such person being entitled to presume *omnia rite acta.*[10] A subsequent regularly constituted meeting of directors may ratify and make valid *ab initio* what was done at an irregularly constituted meeting.[11]

237. It is the duty of directors to keep minutes of their meetings (s. 71 (1)). Such minutes are *prima facie* proof of the matters recorded (s. 71 (2) (3)).[12] Minutes are not the only admissible evidence of the proceedings.[13] To be valid they must be made within a reasonable time.[14] No alteration of minutes should be made after they are signed by the chairman.[15]

238. Articles of association may confer power on directors to act by signed resolution without a meeting.[16]

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[1] Per Turner L.J. in *Nicol's* case, 1859, 3 De G. & J. 387, at p. 440.

[2] *In re Great Northern Salt and Chemical Works*, 1889, 59 L.J. Ch. 288.

[3] *Halifax Sugar Refining Co.* v. *Francklyn, Ltd.*, 1889, 59 L.J. Ch. 591.

[4] *La Compagnie de Mayville* v. *Whitley*, [1896] 1 Ch. 788.

[5] *York Tramways Co.* v. *Willows*, 1882, 8 Q.B.D. 685, at p. 698; *Lyster's* case, 1867, L.R. 4 Eq. 233.

[6] *Re Fireproof Doors, Ltd.*, [1916] 2 Ch. 142.

[7] *Yuill* v. *Greymouth Point Elizabeth Rly. and Coal Co.*, [1904] 1 Ch. 32; *Re North-Eastern Insurance Co.*, [1919] 1 Ch. 198.

[8] *Universal Corporation, Ltd.* v. *Simson*, 1908, 16 S.L.T. 618; *Scottish Petroleum Co., Ltd.*, 1883, 23 Ch. D. 413.

[9] *Portuguese Consolidated Copper Mines*, 1889, 42 Ch. D. 160; *Homer District Consolidated Gold Mines*, 1888, 39 Ch. D. 546; *Harben* v. *Phillips*, 1883, 23 Ch. D. 14; *Young* v. *Ladies' Imperial Club*, [1920] 2 K.B. 523.

[10] *Royal British Bank* v. *Turquand*, 1856, 6 E. & B. 327; *Bonelli's Telegraph Co.*, 1871, L.R. 12 Eq. 246.

[11] *In re Portuguese Consolidated Copper Mines, Ltd.*, 1890, 45 Ch. D. 16, at p. 26; *In re Land Credit Company of Ireland*, 1869, L.R. 4 Ch. 460, at p. 473.

[12] *City of Glasgow Bank Liqrs.*, 1880, 7 R. 1196.

[13] *In re Pyle Works* (No. 2), [1891] 1 Ch. 173, at p. 184; *Re Fireproof Doors, Ltd.*, [1916] 2 Ch. 142.

[14] *Toms* v. *Cinema Trust*, [1915] W.N. 29.

[15] *In re Cawley & Co.*, 1889, 42 Ch. D. 209, per Esher M.R. at p. 226.

[16] Palmer's Company Law, 12th ed., p. 206.

(vii) *Retirement, Resignation, and Removal.*

239. Express provision for the vacating of the office of director is made in the Act of 1908 only in the case of a director failing to take up his qualification shares within the time specified in the articles or the Act (s. 73). The articles usually make provision for the periodical retirement of directors by rotation,[1] and for the vacation of the office on disqualification of a director through failing to acquire his qualification shares, holding any other office of profit under the company except that of managing director or manager, becoming bankrupt, being found lunatic or becoming of unsound mind, or being concerned with or participating in the profits of any contract with the company, other than a contract with a company of which he is a director (subject to his not voting in respect thereof) (Table A, Art. 77).[2] As soon as the disqualification arises the director *ipso facto* vacates his office,[3] and if the disqualification be removed he must be elected of new.[4]

240. The articles may also provide for the resignation of directors, and, where this is so, resignations should be conform to the articles.[5] In the absence of any such provision and of any special agreement for service a director may resign. It seems enough if he give notice to the company by leaving it at or sending it by post to the registered office of the company (s. 116); [6] he need not give notice to the company in general meeting.[7] Resignation of "a seat on the board" is held to embrace both permanent and ordinary directorships held by the director so resigning.[8] A director may vacate office by parting with his qualification shares.[9] Once a director intimates his resignation he may not withdraw it without the assent of the company.[10]

241. The Act of 1908 makes no provision for the removal of directors apart from the statutory disqualifications. But the articles may so provide (Table A, Art. 86). Otherwise the company has no power of removal, except by first altering the articles by special resolution.[11] If the power to remove is only on reasonable cause, the Court will not interfere with the decision of a meeting lawfully exercising the power.[12] If the company in general meeting refuses to employ a director, the Court, in England, will not force it to do so.[13] But if the exclusion is the action of a board of directors, even if under the articles they have the general powers of the company, the Court will grant the aggrieved director an injunction against the other directors.[1] If a deadlock ensues owing to the irremovability of a director, the Court will grant a winding-up order.[2]

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[1] Table A, Arts. 78, 79, 84, 85, and 86.

[2] See Buckley, 10th ed., p. 648.

[3] *In re The Bodega Co., Ltd.*, [1904] 1 Ch. 276, per Farwell J.; *Astley* v. *New Tivoli, Ltd.*, [1899] 1 Ch. 151.

[4] *Bodega Co., Ltd.*, *supra.*

[5] *Kingsburgh Motor Construction Co.* v. *Scott*, 1902, 10 S.L.T. 424.

[6] Palmer's Company Law, p. 199; see *Municipal Freehold Land Co.* v. *Pollington*, 1890, 63 L.T. 238.

[7] Palmer's Company Law, *ut supra.*

[8] *Mosely* v. *Koffyfontein Mines, Ltd.*, [1910] 2 Ch. 382.

[9] *Gilbert's* case, 1870, L.R. 5 Ch. 559, at p. 565.

[10] *Glossop* v. *Glossop*, [1907] 2 Ch. 370.

[11] *Imperial Hydropathic Hotel Co. (Blackpool)* v. *Hampson*, 1882, 23 Ch. D. 1; *Harben* v. *Phillips*, 1883, 23 Ch. D. 14, at p. 39.

[12] *Osgood* v. *Nelson*, 1872, L.R. 5 H.L. 636.

[13] *Harben* v. *Phillips*, 1883, 23 Ch. D. 14; *Bainbridge* v. *Smith*, 1889, 41 Ch. D. 462.

SUBSECTION (3).—*Secretary and other Officers.*

(i) *In General.*

242. The appointment of an officer of a company is usually made by contract executed pursuant to the provisions of the Act of 1908 as to the form of contracts (s. 76). An appointment made in the articles is not a contract in writing, but may be held as evidence of the terms of the contract.[3]

243. Officers having authority to do so may contract on behalf of the company, and if the signature of the officer be expressed to be on behalf of the company the agent incurs no personal liability under the contract.[4] But a company will not be liable on a contract made on forged signatures by an officer of the company.[5] Representations, in order to bind the company, must be made by someone holding an official position in the company acting in his official capacity; [6] *e.g.* a solicitor as such has no power to bind a company by any representation he makes as to the company's position.[7] But the company may be bound even although the action of the servant be fraudulent.[8] The company may be liable for defamation by a servant acting in the course of an authorised employment although without authority, express or implied, to utter the libel.[9] Where a company repudiates a libel uttered by a servant it should take instant steps to stop its continued circulation.[10] A company may be sued by a servant for breach of a duty committed by another servant to whom execution of the duty has been delegated.[11]

244. If the contract of employment does not make provision anent termination of the employment, an officer of the company is entitled to reasonable notice or damages in lieu thereof.[12] A winding-up order operates as a wrongful dismissal of the servants of the company and frees the servants from restrictive obligations in their contracts of service.[1] But the employees may enter into a new engagement with the liquidator, and expressly or by implication waive the constructive notice effected by liquidation. Or the liquidator may convert the constructive notice into actual notice, ensuring to the employee in the interval the contract wages and work.[2] But *quœre* whether a voluntary liquidation operates *ipso facto* as a notice of discharge to the company's servants.[3] The wages or salary of any clerk or servant up to £50 in respect of services rendered to the company during four months prior to the commencement of winding-up rank in priority to other debts in the winding-up (s. 209). In this connection the manager and secretary of a company are not held to be clerks or servants.[4]

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[1] *Pulbrook* v. *Richmond, etc. Consolidated Mining Co.*, 1878, 9 Ch. D. 610.

[2] *Sailing-ship "Kentmere,"* [1897] W.N. 58.

[3] *Eley* v. *Positive Government Security Life Assurance Co.*, 1876, 1 Ex. D. 88; *In re Rotherham Alum and Chemical Co.*, 1883, 25 Ch. D. 103.

[4] *Gadd* v. *Houghton*, 1876, 1 Ex. D. 357.

[5] *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439.

[6] *National Exchange Co. of Glasgow* v. *Drew*, 1860, 23 D. 1.

[7] *Forth Marine Insurance Co.* v. *Burnes*, 1848, 10 D. 689.

[8] *Barwick* v. *English Joint Stock Bank*, 1867, L.R. 2 Ex. 259; cf. *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K.B. 489.

[9] *Citizen's Life Assurance Co.* v. *Brown*, [1904] A.C. 423; *Finburgh* v. *Moss Empires*, 1908 S.C. 928; *Agnew* v. *British Legal Life Assurance Co., Ltd.*, 1906, 8 F. 422; *Riddell* v. *Glasgow Corporation*, 1910 S.C. 693; [1911] A.C. 209; 1911 S.C. (H.L.), 35.

[10] *British Legal Life Assurance and Loan Co.* v. *Pearl Life Assurance Co.*, 1887, 14 R. 818.

[11] *Wright* v. *Dunlop & Co., Ltd.*, 1893, 20 R. 363.

[12] See Gloag on Contract, 861 *et seq.*; *General Billposting Co.* v. *Atkinson*, [1909] A.C. 118.

(ii) *Secretary.*

245. In practice the secretary of a company is appointed either by nomination in the articles, in the case of a first secretary, or by resolution of a general meeting, and he is usually remunerated by a fixed salary. The secretary of a company is a mere servant [5] and has no power as such to bind the company by contract or to register a transfer until passed by the directors.[6] If authorised to certify transfers, his certificate will not bar the company from repudiating a transfer if he falsely acknowledges the lodging of share certificates with him.[7] If he forges a share certificate the company will not be bound by it.[8] Knowledge by a secretary of a fact is not necessarily knowledge of the company, *e.g.* if obtained by him as secretary of another company.[9] Notice of a general meeting given by the secretary without the authority of the directors is invalid,[10] unless ratified by them before the meeting.[11] But a letter written by a secretary is assumed *prima facie* to be written with the authority of the directors.[12]

246. The secretary has no power to make representations to the public as to the state of the company's business.[13] But he will be liable along with the directors if he joins in fraudulent misrepresentations, and he cannot plead that he was acting under instructions.[1] He is alone liable if, when held out as having authority to answer certain questions, he gives untrue answers for his own private ends.[2] Where the company has no manager and the secretary acts as such in making the annual list and summary (s. 26) he may be prosecuted as such for making default.[3] He may be appointed liquidator of the company of which he was secretary.[4] He is liable as for misfeasance if he receives a secret commission.[5] But he is not personally liable for a misapplication of the company's funds although in knowledge of it.[6] *Quære* whether he can be found liable for a penalty under the Stamp Act, 1891, for registering a transfer insufficiently stamped.[7] He is liable for penalties under the Act in various matters (*e.g.* s. 17 (2), 26 (4), 87 (1) (*c*), 88 (3), 216). The secretary has no lien over the books of the company coming into his possession as secretary and not under any special contract of employment relative to documents.[8] He is not entitled to a preferential ranking in respect of his salary in a winding-up.[9]

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[1] *Chapman's* case, 1866, L.R. 1 Eq. 346; *MacDougall's* case, 1886, 32 Ch. D. 306; see *Measures Bros., Ltd.* v. *Measures*, [1910] 1 Ch. 336; (C.A.) 2 Ch. 248; *General Billposting Co., Ltd.* v. *Atkinson*, [1909] A.C. 118.

[2] *Day* v. *Tait*, 1900, 8 S.L.T. 40.

[3] *Midland Counties District Bank, Ltd.* v. *Attwood*, [1905] 1 Ch. 357; *Reigate* v. *Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592.

[4] *Scottish Poultry Journal Co.*, 1896, 4 S.L.T. 167; *Clyde Football Co.*, 1900, 8 S.L.T. 328; *In re Newspaper Proprietary Syndicate, Ltd.*, [1900] 2 Ch. 349.

[5] *Barnett* v. *South London Tramways Co.*, 1887, 18 Q.B.D. 815.

[6] *Chida Mines, Ltd.* v. *Anderson*, 1905, 22 T.L.R. 27.

[7] *George Whitechurch, Ltd.* v. *Cavanagh*, [1902] A.C. 117.

[8] *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439; contrast *Clavering, Son & Co.* v. *Goodwins, Jardine & Co.*, 1891, 18 R. 652.

[9] *In re Fenwick, Stobart & Co.*, [1902] 1 Ch. 507.

[10] *In re State of Wyoming Syndicate*, [1901] 2 Ch. 431.

[11] *Hooper* v. *Kerr, Stuart & Co.*, 1900, 83 L.T. 729.

[12] *Johnson* v. *Lyttle's Iron Agency*, 1877, 5 Ch. D. 687, at p. 691.

[13] *Partridge* v. *The Albert Life Assurance Co.*, 1872, 16 Sol. J. 199.

(iii) *Managers.*

247. The directors of a company are responsible for the management of the company, and *prima facie* cannot delegate their powers.[10] The articles, however, usually provide for their appointing a manager or managing director (Table A, Art. 72), and may also provide for their delegating to the managing director such of their powers as they think fit.[11] The directors may still act as to any matter delegated.[12] In the absence of express definition of a manager's powers his appointment entitles him only to deal with the ordinary commercial business of the company.[13] The rule *omnia rite acta* applies to his actings in questions with third parties, and his acts are valid notwithstanding any defect that may afterwards be discovered in his appointment (s. 74). The Act of 1908 imposes fines and penalties on the company, its directors and managers, for default in complying with various directory provisions of the Act.[14] A *de facto* manager will be liable for such penalties.[15]

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[1] *Cullen* v. *Thomson & Kerr*, 1862, 24 D. (H.L.), 10.

[2] *British Mutual Banking Co.* v. *Charnwood Forest Rly. Co.*, 1887, 18 Q.B D. 714.

[3] *Gibson* v. *Barton*, 1875, L.R. 10 Q.B. 329.

[4] *Gilmour's Trs.* v. *Kilmarnock Heritable Property Investment Co.*, 1883, 10 R. 1221.

[5] *M'Kay's* case, 1875, 2 Ch. D. 1; *Barrow's* case, 1880, 28 W.R. 341.

[6] *Joint Stock Discount Co.* v. *Brown*, 1869, L.R. 8 Eq. 381, at p. 406.

[7] See Wilton on Company Law and Practice, p. 43.

[8] *Barnton Hotel Co., Ltd.* v. *Cook*, 1899, 1 F. 1190; *Gladstone* v. *M'Callum*, 1896, 23 R. 783.

[9] *Scottish Poultry Journal Co.*, 1896, 4 S.L.T. 167; *Clyde Football Co.*, 1900, 8 S.L.T. 328.

[10] *Cobb* v. *Becke*, 1845, 6 Q.B. 930, at p. 936.

[11] *E.g. Allison* v. *Scotia Motor and Engineering Co.*, 1906, 14 S.L.T. 9.

[12] *Huth* v. *Clarke*, 1890, 25 Q.B.D. 391.

[13] *Cartmell's* case, 1874, L.R. 9 Ch. 691.

[14] *E.g.*, ss. 26, 54, 75, 100.

[15] *Gibson* v. *Barton*, 1875, L.R. 10 Q.B. 329; *cf. Rex* v. *Lawson*, [1905] 1 K.B. 541.

(iv) *Solicitor.*

248. Questions affecting solicitors in their relations to companies arise mainly in connection with the flotation of a company and its winding up. In a flotation the solicitor is employed by and must look to the promoters for payment of his charges,[1] but in registered companies preliminary expenses are usually provided for by a contract of which notice is given in the company's prospectus or sometimes by the terms of the memorandum.[2] A clause in articles appointing a solicitor, being *inter socios* only, cannot be founded upon by him, even where he is also a member.[3]

249. A statutory declaration by an enrolled law agent engaged in the formation of a company of compliance with the requirements of the Act in respect of registration of the company and matters precedent and incidental thereto may be accepted by the Registrar of Companies as evidence of compliance (s. 17).

(v) *Auditors* (see AUDIT, *infra*, subs. (7) (ii)).

SUBSECTION (4).—*Meetings of Members.*

(i) *General Meetings.*

250. General meetings of a company comprise the statutory meeting, ordinary meetings, and extraordinary meetings.

251. The purpose of the statutory meeting is to put the shareholders of the company as early as possible in possession of all the important facts relating to the new company, *e.g.* what shares have been taken up, what moneys received, what contracts entered into, what sums spent on preliminary expenses, who are the officers and who the members of the company, and to give them an opportunity of meeting and discussing the management, methods, and prospects of the company.[4] The provision of the Act requiring it to be held applies only to a company limited by shares and registered on or after 1st January 1901, and only in part to a private company (s. 65 (10)). It does not apply to unlimited companies, nor to companies limited by guarantee, even though having a capital divided into shares (s. 65 (1)). The meeting must be held within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business. The directors meet, at least seven days before the day on which the meeting is held, and forward to every member of the company a report, called the Statutory Report, certified by not less than two directors of the company or by the sole director and manager, and stating various statutory particulars (s. 65 (3) and (4)) relevant to the purpose of the meeting. The directors must cause a copy of the statutory report to be filed with the Registrar of Companies forthwith after the sending thereof to the members (s. 65 (5)). At the meeting the directors must make available a list of the members and the shares held by them, for reference by the members during the meeting (s. 65 (6)), and the members may discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not. But no resolution of which notice has not been given may be passed (s. 65 (7)). The meeting may adjourn from time to time, and may at any adjourned meeting pass resolutions of which notice has been given though subsequent to the original meeting (s. 65 (8)). A private company does not require to forward to the members, nor to file with the registrar, a statutory report, but the meeting must have before it the list of members and their shareholdings, and may discuss any matter relating to the formation of the company, and may pass resolutions of which notice has been given in accordance with the articles.[1] The notice calling the statutory meeting should state it to be such.[2]

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[1] Wilton, Company Law and Practice, p. 33.

[2] *Edinburgh Northern Tramways Co.* v. *Mann*, 1896, 23 R. 1056; see also *Welsh & Forbes* v. *Johnston*, 1906, 8 F. 453.

[3] *Eley* v. *Positive, etc. Government Security Life Assurance Co.*, 1876, 1 Ex. D. 20, 88.

[4] See Palmer's Company Law, 12th ed., p. 169.

252. An ordinary general meeting of the company must be held once at least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting. For default in either requirement [3] penalties are imposed on officers of the company knowingly a party to the default (s. 64 (1)). If default is made, any member of the company may apply to the Court to call or direct the calling of a meeting (s. 64 (2)). The articles usually regulate the holding of the annual meeting and provide for the convening of the meeting by two members in the event of default (Table A, Art. 46).

253. Extraordinary general meetings are general meetings other than the statutory and the annual meeting. An appeal to a general meeting is the proper and only remedy of shareholders who complain only of mismanagement.[4]

(ii) *How Meetings are Convened.*

254. Normally a general meeting of a company is not properly convened unless pursuant to a resolution passed at a board meeting; [5] but the articles may provide for a resolution of the board being passed by signed resolution without a meeting. The articles usually provide that the directors may as they think fit convene an extraordinary general meeting and shall do so on the requisition of a specified minimum number of members. Notwithstanding anything in the articles, on a requisition being made, signed by the holders of not less than one-tenth of the issued share capital of the company upon which all calls and sums due have been paid, stating the objects of the meeting and deposited at the registered office of the company, the directors must forthwith proceed to convene an extraordinary general meeting of the company (s. 66 (1) (2)). If within twenty-one days from the requisition the directors do not proceed to cause a meeting to be held, the requisitionists or a majority of them may themselves call it (s. 66 (3)), and they must do so as nearly as possible in the same manner as meetings are convened by directors (s. 66 (5)). Further, in default of and subject to any regulations in the articles, five members may call a meeting (s. 67 (ii)).

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[1] *Gardner* v. *Iredale*, [1912] 1 Ch. 700.

[2] *Ibid.* at 712.

[3] *Smedley* v. *Registrar of Companies*, [1919] 1 K.B. 97.

[4] *Isle of Wight Rly. Co.* v. *Tahourdin*, 1884, 25 Ch. D. 323.

[5] *Re Haycroft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230; *Harben* v. *Phillips*, 1882, 23 Ch. D. 14.

255. A meeting of a company may be called by seven days' notice in writing, exclusive of the day on which the notice is served and inclusive of the day for which notice is given (Table A, Art. 49). The notice must be served on every member of the company unless the articles otherwise provide (s. 67). It may be sent by prepaid letter to the shareholder's registered address.[1] Non-receipt of a notice by a member will not invalidate the proceedings,[2] but the omission to give due notice to members invalidates the meeting.[3] Until registered as members the representatives of a deceased member are not entitled to notice and it is enough if it be sent to the deceased member's registered address.[4] In the case of a meeting of subscribers to the memorandum reasonable notice is sufficient.[5] If notices be in substantial compliance with the articles, the Court will not strictly construe them.[6] In construing a notice it will be presumed that shareholders know the Acts of Parliament and the terms of the memorandum and articles.[7] If the articles require notice to be given of special business the notice should state the nature thereof.[8] An adjourned meeting is in law a continuance of the ordinary meeting and no fresh notice of the business need be given.[9] A notice that a meeting will be held subject to a contingency, *e.g.* the passing of a resolution at a prior meeting, is not a good notice,[10] and the notice should be made absolute, unless the articles authorise that the notice may call the second meeting only in the event of the resolution being passed at the prior meeting.[11]

(iii) *Proceedings at Meetings.*

256. In order to constitute a general meeting a quorum of members must be present. One member cannot constitute a quorum of a general meeting,[1] but may of a class meeting.[2] The articles usually provide what number of members shall constitute a quorum (Table A, Arts. 4 and 51). A quorum of members means a quorum of effective members qualified to take part in and decide upon questions brought before the meeting and present throughout.[3] A company can form one of a quorum (s. 68).[4] If the total number of members of a company is less than a quorum it is thought that the want of a quorum is immaterial.[5] If no quorum be present the proceedings are invalid.[6] A provision that if no quorum be present the meeting shall be adjourned (Table A, Art. 52) is effective. But where only one shareholder attends, a new meeting should, in the ordinary case, be called.[7]

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[1] Table A, Art. 110.
[2] Buckley on the Companies Acts, 10th ed., p. 674.
[3] *Smyth* v. *Darley*, 1849, 2 H.L.C. 789; *Young* v. *Ladies Imperial Club*, [1920] 2 K.B. 523.
[4] *Allen* v. *Gold Reefs of West Africa*, [1900] 1 Ch. 656.
[5] *John Morley Building Co.* v. *Barras*, [1891] 2 Ch. 386.
[6] *Henderson* v. *Bank of Australasia*, 1890, 45 Ch. D. 330.
[7] *Oakbank Oil Co.* v. *Crum*, 1882, 8 App. Cas. 65; *Campbell's* case, 1873, L.R. 8 Ch. 1, at p. 22.
[8] *Pacific Coast Coal Mines, Ltd.* v. *Arbuthnot*, [1917] A.C. 617; Palmer, p. 173 *et seq.*
[9] *Scadding* v. *Lorant*, 1850, 3 H.L.C. 418; *Wills* v. *Murray* 1850, 4 Ex. Rep. 843.
[10] *Alexander* v. *Simpson*, 1890, 43 Ch. D. 139.
[11] *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 94.

257. Unless the articles make provision for the election of a chairman of a meeting, the meeting elects its own chairman from the members present (s. 67 (iii), Table A, Art. 90). The duty of a chairman is to keep order and see that the business is properly conducted, and he has *prima facie* authority to decide all emergent questions which require decision at the time.[8] If he acts in violation of his duty a majority of those present must decide, *e.g.* a chairman cannot dissolve a meeting before it has finished its business.[9] If a chairman improperly refuses to put an amendment, the resolution, if passed, is not binding, and may be set aside by the Court.[10]

258. The articles usually regulate the rights of the members as to voting (Table A, Art. 60). In the absence of any regulations every member has one vote (s. 67 (iv)). A shareholder is entitled to vote or not and in such manner as he pleases [11] provided he is on the register,[12] but may contract out of his right to vote.[13] But a majority of members may not use their votes to commit a fraud on the minority.[14] An alien enemy cannot in general vote.[15] A company can vote as if an individual (s. 68).

259. Unless a poll is demanded the voting is by shew of hands, according to the common law rule.[16] Plurality of votes and of proxies is disregarded.[1] The chairman has no casting vote.[2] Any member may demand a poll. This rule may be qualified by the articles (*cf.* s. 69 of the Act). Where a demand by more than one member is requisite, joint holders of a share count as two.[3] The poll may be taken there and then or at such time as the chairman fixes, and the meeting in point of law subsists until it is taken.[4] A member may vote at a poll, though not present when the poll is demanded, up to the time when it is closed by the chairman.[5] Only persons present in person or by proxy can be counted,[6] and the register of members is the test of the right to vote.[7] Voting by polling papers delivered at the registered office is not competent in the absence of provision therefor in the articles.[8]

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[1] *Sharp* v. *Dawes*, 1876, 2 Q.B.D. 26 ; *In re Sanitary Carbon Co.*, 1877, W.N. 223.

[2] *East* v. *Bennett Bros.*, [1911] 1 Ch. 163 ; *In re Taurine Co.*, 1883, 25 Ch. D. 118.

[3] *Henderson* v. *Louttit & Co., Ltd.*, 1894, 21 R. 674.

[4] *In re Kelantan Estates*, [1920] W.N. 274.

[5] See Palmer's Company Law, 12th ed., p. 176 ; cf. *In re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466.

[6] *In re Romford Canal Co.*, 1883, 24 Ch. D. 85 ; *Howling's Trs.* v. *Smith*, 1905, 7 F. 390.

[7] *Sharp* v. *Dawes*, *supra*.

[8] *In re Indian Zoedone Co.*, 1884, 26 Ch. D. 70.

[9] *National Dwellings Society* v. *Sykes*, [1894] 3 Ch. 159.

[10] *Henderson* v. *Bank of Australasia*, 1890, 45 Ch. D. 330.

[11] *Burland* v. *Earle*, [1902] A.C. 83 ; but see *Cook* v. *Deeks*, [1916] 1 A.C. 554.

[12] *Siemens Bros. & Co.* v. *Burns*, [1918] 2 Ch. 324, at p. 336.

[13] *Puddephatt* v. *Leith*, [1916] 1 Ch. 200.

[14] *Menier* v. *Hooper's Telegraph Works*, 1874, L.R. 9 Ch. 350 ; *Burland* v. *Earle*, *supra*; *Brown* v. *British Abrasive Wheel Co.*, [1919] 1 Ch. 290 ; *Brown* v. *Stewart*, 1898, 1 F. 316 ; *Orr* v. *Glasgow, Airdrie, etc. Rly. Co.*, 1860, 3 Macq. 799.

[15] *Robson* v. *Premier Oil and Pipe Line Co.*, [1915] 2 Ch. 124.

[16] *In re Horbury Bridge Coal, Iron, and Waggon Co.*, 1879, 11 Ch. D. 109.

260. There is no right to vote by proxy at common law,[9] but the articles usually regulate the matter (Table A, Arts. 64–67) and require the proxies to be signed by the granter; the articles must be observed.[10] Proxies signed in blank are effective if filled up before use.[11] Where articles require deposit of proxies a certain time before a meeting (Table A, Art. 66), if the meeting be adjourned for the taking of the poll it is not enough that proxies be lodged the specified time before the adjourned meeting.[12] Unless the articles otherwise provide, the withdrawal of a proxy after a poll is fixed and before it is held is not effective.[13] Articles may provide for proxies obtained by the chairman being deemed valid.[14] Directors, acting in good faith in the interests of the company, may send out stamped proxy forms.[15] A proxy should be stamped with the requisite stamp: a penny stamp for a single meeting; ten shillings for several.[16]

(iv) *Resolutions at Meetings.*

261. Resolutions may be ordinary, extraordinary, or special. Where the regulations of a company provide that certain acts shall be done by the company in general meeting, an ordinary resolution passed by a majority of members present, whether in person or by proxy, according as a poll is not or is demanded is sufficient.[1] But a resolution inconsistent with the articles is invalid unless confirmed as a special resolution.[2] If the articles require notice to be given of special business, the articles should define what is special business, and the notice of the meeting should in such case state the nature of the special business.[3] Where directors are interested in a contract to be submitted to a meeting for confirmation, the notice should state the nature of the interest.[4]

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[1] *Ernest* v. *Loma Gold Mines, Ltd.*, [1897] 1 Ch. 1; but see *J. T. Clark & Co.*, 1911 S.C. 243.

[2] Bell's Dict., 7th ed., p. 111.

[3] *Siemens Bros. & Co.* v. *Burns*, [1918] 2 Ch. 324, at p. 337.

[4] *R.* v. *Wimbledon Local Board*, 1882, 8 Q.B.D. 459; Palmer's Company Law, p. 181.

[5] *Campbell* v. *Maund*, 1836, 5 Ad. & El. 865.

[6] *M'Millan* v. *Le Roi Mining Co.*, [1906] 1 Ch. 331.

[7] *Collins* v. *Donald*, 1895, 3 S.L.T. 57; *Pender* v. *Lushington*, 1877, 6 Ch. D. 70.

[8] *M'Millan*, *supra*.

[9] See Palmer's Company Law, p. 181.

[10] *Harben* v. *Phillips*, 1882, 23 Ch. D. 14.

[11] *Sadgrove* v. *Bryden*, [1907] 1 Ch. 318; *Ernest* v. *Loma Gold Mines, Ltd.*, [1897] 1 Ch. 1.

[12] *Shaw* v. *Tati Concessions*, [1913] 1 Ch. 292; *M'Laren* v. *Thomson*, [1917] 2 Ch. 41, 261. Such a provision would not apply to proxies of creditors. See *La Lanière de Roubaix* v. *Glen Glove Co.*, 1926 S.C. 91.

[13] *Spiller* v. *Mayo* (*Rhodesia*) *Development Co.* (1908), *Ltd.*, [1926] W.N. 78.

[14] *Wall* v. *Exchange Investment Corporation*, [1926] 1 Ch. 143.

[15] *Peel* v. *London and North-Western Rly. Co.*, [1907] 1 Ch. 3.

[16] Stamp Act, 1891, s. 80, and Schedule.

262. An extraordinary resolution is one passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy,[5] where proxies are allowed, at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given (s. 69 (1)). It is sufficient that the notice state that the meeting is called for the purpose of passing "the following extraordinary resolution," and, at least in the case of a statutory resolution, the notice should describe it as an extraordinary resolution.[6] Where all the shareholders are present the omission so to describe it can be waived.[7] A declaration of the chairman that the resolution is carried is, unless a poll is demanded, conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution (s. 69 (3)). But if the facts stated in the minute of meeting under the hand of the chairman do not warrant his declaration of the result, his declaration will be disregarded.[8] A poll may be demanded by three persons entitled to vote, unless the articles require a larger number, not exceeding five (s. 69 (4)). In computing the majority on the poll reference must be had to the number of votes to which each member is entitled by the articles (s. 69 (5)). Notice of an extraordinary resolution, *e.g.* for winding up (s. 182) should shew that the matter will be dealt with only at one meeting.[9]

263. A special resolution is one which has been passed in manner required for the passing of an extraordinary resolution and confirmed by a majority present in person or by proxy at a subsequent general meeting of which notice has been duly given, held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting (s. 69 (2)). The days of the meetings are excluded.[10] A confirmatory meeting held within a month may be adjourned to a date outwith the month.[1] A poll may be demanded at the confirmatory, as at the first meeting (s. 69 (4)). If the articles so provide, the two meetings may be convened by the same notice,[2] but the calling of the second meeting must be made absolute,[3] unless the articles authorise that the notice may call the second meeting only in the event of the resolution being passed at the first meeting.[3] The notice of the first meeting need not describe the resolution as an extraordinary resolution.[4] A special resolution need not be passed at the first meeting in the exact words of the notice therefor,[5] but no amendment is competent at the confirmatory meeting.[6] As in the case of an extraordinary resolution, the declaration of the chairman, unless a poll is demanded, is conclusive evidence that the resolution is carried (s. 69 (3)).[7]

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[1] *North-West Transportation Co.* v. *Beatty*, 1887, 12 App. Cas. 589, 593.

[2] *Quin & Axtens* v. *Salmon*, [1909] 1 Ch. 311; [1909] A.C. 442.

[3] *Pacific Coast Coal Mines, Ltd.* v. *Arbuthnot*, [1917] A.C. 607.

[4] *Tiessen* v. *Henderson*, [1899] 1 Ch. 861; but see *Grant* v. *United Kingdom Switchback Rlys. Co.*, 1888, 40 Ch. D. 135.

[5] See *California Redwood Co.*, 1885, 13 R. 335.

[6] See *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 94; *MacConnel* v. *E. Prill & Co.*, [1916] 2 Ch. 57.

[7] *In re Oxted Motor Co.*, [1921] 3 K.B. 32; cf. *In re Express Engineering Works, Ltd.*, [1920] 1 Ch. 466.

[8] *Cowan* v. *Scottish Publishing Co.*, 1892, 19 R. 437; *In re Caratal (New) Mines, Ltd.*, [1902] 2 Ch. 498; see *John T. Clark & Co.*, 1911 S.C. 243.

[9] *In re Bridport Old Brewery Co.*, 1867, L.R. 2 Ch. 191; *In re Silkstone Fall Colliery Co.*, 1876, 1 Ch. D. 38.

[10] *In re Railway Sleepers Supply Co.*, 1885, 29 Ch. D. 204.

264. A copy of every special and extraordinary resolution must, within fifteen days from the confirmation of the special resolution, or from the passing of the extraordinary resolution, as the case may be, be printed and forwarded to the registrar of companies to be recorded (s. 70 (1)). Where articles have been registered, a copy of every special resolution for the time being in force must be embodied in or annexed to every copy of the articles issued after the confirmation of the resolution (s. 70 (2)); (this does not apply to an extraordinary resolution, but it is usually done). If no articles have been registered, a copy of every special resolution must be forwarded at the request of a member on payment of a maximum fee of a shilling (s. 70 (3)). Penalties for default in carrying out these requirements are imposed on the company and directors and managers knowingly and wilfully in default (s. 75).

(v) *Evidence as to Meetings.*

265. Every company must cause minutes of all proceedings of general meetings and of its directors or managers to be entered in books kept for that purpose (s. 71 (1)). Any such minute, if purporting to be signed by the chairman of the meeting or by the chairman of the next succeeding meeting, is evidence of the proceedings at the meeting (s. 71 (2)). The chairman of the meeting may sign the minute at the meeting or before the next meeting. No alterations should be made on minutes after they are signed.[8] The minutes are *prima facie* proof of the meetings having been duly held and convened, and of their contents, but are not conclusive evidence (s. 71 (3)). A transaction may be proved though not recorded in the minutes,[1] *e.g.* entries in the company's books may be evidence of a resolution.[2] But where a director alleges a transaction, the absence of a minute is evidence to the contrary.[3]

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[1] *Neuschild* v. *British Equatorial Oil Co.*, [1925] 1 Ch. 346.

[2] *In re North of England Steamship Co.*, [1905] 2 Ch. 15.

[3] See *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 94.

[4] *Re Penarth Pontoon Co.*, [1911] W.N. 240; see *MacConnel* v. *E. Prill & Co.*, [1916] 2 Ch. 57.

[5] *Torbock* v. *L. Westbury*, [1902] 2 Ch. 871.

[6] *Torbock* v. *L. Westbury*, *supra*; *Wall* v. *London and Northern Assets Corporation*, [1898] 2 Ch. 469; see, however, *In re French Tubeless Tyre Co.*, [1900] 1 Ch. 408.

[7] *Cowan* v. *Scottish Publishing Co.*; *In re Caratal (New) Mines, Ltd.*; *John T. Clark & Co.*, *supra*.

[8] Lord Esher M.R. in *In re Cawley & Co.*, 1889, 42 Ch. D. 209.

SUBSECTION (5).—*Commencement of Business.*

266. A private company (s. 121) may go to allotment immediately after the certificate of incorporation is obtained, and may commence business and exercise its borrowing powers forthwith. Companies issuing a prospectus inviting the public to subscribe for shares may not commence any business or exercise any borrowing powers unless (to state shortly the provisions of the Act of 1908) (1) shares payable in cash have been allotted to the extent of the minimum subscription; (2) every director has paid the amount payable on application and allotment on all shares taken by him; and (3) the secretary or a director has filed a statutory declaration (Form 44 of the Order of the Board of Trade of 29th March 1909) that these conditions have been complied with (s. 87). In the case of companies not issuing a prospectus inviting the public to subscribe for shares the same conditions apply except that there must have been filed with the Registrar a statement in lieu of prospectus, and each director must have paid the amount payable on application and allotment on the shares taken by him which are payable in cash (s. 87 (1), s. 85 (7)).

On the filing of the statutory declaration, the Registrar must certify that the company is entitled to commence business, and his certificate is conclusive evidence of the fact (s. 87 (2)). The most important effect of this provision is that any contract, including a contract to take shares,[4] is provisional only (s. 87 (3)), and is to be read as if it contained *in gremio* an express condition that it should not be binding on the company unless and until it became entitled to commence business.[5]

SUBSECTION (6).—*Returns to Registrar.*

267. The principal returns to the Registrar required to be made by directors and officers of the company are those relating to the Annual List and Summary (ss. 26, 20, 75),[6] and as to allotments (s. 88).

Every company incorporated outside the United Kingdom which establishes a place of business within it must within one month from its establishment file with the Registrar of Companies a certified copy of its constituting documents in English, a list of the directors of the company, and the names and addresses of persons resident in the United

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[1] *Re Pyle Works* (No. 2), [1891] 1 Ch. 173; *Re Fireproof Doors, Ltd.*, [1916] 2 Ch. 142; *In re Great Northern Salt Co.*, 1890, 44 Ch. D. 472.

[2] *In re Great Northern Salt Co.*, *supra*; *Knight's* case, 1867, L.R. 2 Ch. 321.

[3] *In re Rotherham Alum and Chemical Co.*, 1884, 25 Ch. D. 103.

[4] See Buckley, 10th ed., p. 205.

[5] *In re Otto Electrical Manufacturing Co.*, [1906] 2 Ch. 390; cf. *Brown* v. *Stewart*, 1898, 1 F. 316.

[6] See also Companies (Particulars as to Directors) Act, 1917; see *supra*, s. 7 (1), s. 9 (3) (i).

Kingdom authorised to accept for the company service of process and notices required to be served on the company (s. 274). "Place of business" includes a transfer or share registration office. "Establishes" a place of business is to be distinguished from "carrying on business."[1]

SUBSECTION (7).—*Accounts and Audit.*

(i) *Accounts.*

268. Directors must cause proper books of accounts to be kept. The directors' duty in the matter is usually the subject of regulation in the articles (Table A, Art. 103–108). The books of accounts are usually required by the articles to be kept at the registered office of the company. A shareholder is entitled to inspection and production of copies of the balance-sheets and auditors' reports (s. 113 (3)), and holders of preference shares and debentures of a company have by statute the same right to receive and inspect the balance-sheets of the company and the reports of the auditors and other reports as is possessed by the holders of ordinary shares in the company; but this does not apply to a private company or to a company registered before 1st July 1908 (s. 114). The articles may exclude or restrict any right of a member to inspect the books of accounts, and this is effective subject to the rights of inspection conferred by the statute. The articles usually negative the right of inspection of any account book or document except where conferred by statute, or authorised by the directors, or by a resolution of the company in general meeting. A right of inspection includes a right to make extracts.[2] A clause giving a right to inspect ceases to apply when the company goes into voluntary liquidation.[3] Both creditors and contributories may be given the right to inspect by order of the Court in a winding-up by or under the supervision of the Court (s. 221) and the order will be made notwithstanding a secrecy clause in the articles.[4]

269. Directors are not bound personally to investigate the company's books, but are entitled to rely upon materials laid before them by officers of the company.[5] They may employ accountants and actuaries, but must still exercise their judgment as business men upon the balance-sheets and estimates submitted to them.[6] Before presenting their annual report and balance-sheet to the shareholders, and before recommending a dividend, directors should have a complete and detailed list of the company's assets and investments prepared for their own use and information, and ought not to be satisfied as to the value of the company's assets merely by the assurance of their chairman, nor with the expression of the belief of their auditors.[1] Balance-sheets are for the protection of shareholders, but for the protection of the public the Legislature has further required every company under the Act with a capital divided into shares to send to the Registrar of Companies every year, under a penalty, a summary of its capital and a list of members (s. 26).[2] A penalty is enforced on any director, officer, or contributory falsifying books of accounts in a winding-up (s. 216).

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[1] *Lord Advocate* v. *Huron and Erie Loan and Savings Co.*, 1911 S.C. 612.

[2] *Nelson* v. *Anglo-American Land Mortgage Agency Co.*, [1897] 1 Ch. 130.

[3] *Yorkshire Fibre Co.*, 1870, L.R. 9 Eq. 650; *In re Kent Coalfields Syndicate*, [1898] 1 Q.B. 754; but see *Morgan's* case, 1884, 28 Ch. D. 620.

[4] *Birmingham Banking Co.*, 1867, 36 L.J. Ch. 150.

[5] *Lees* v. *Tod*, 1882, 9 R. 807; *In re Denham & Co.*, 1884, 25 Ch. D. 752.

[6] *Leeds Estate Building Investment Co.* v. *Shepherd*, 1887, 36 Ch. D. 787.

(ii) *Audit of Accounts and Auditors.*

270. With a view to the protection of the shareholders against the actings of the directors and the officers and servants of the company, the articles usually provide for the audit of the accounts of the company. The importance of the matter has caused it to be the subject of statutory provision (ss. 112 and 113). The articles usually incorporate by reference the statutory provisions (Table A, Art. 109). These provisions include two means whereby audit may be secured: (1) The appointment at each annual general meeting of an auditor or auditors to hold office until the next annual general meeting (s. 112 (1) (4)); (2) failing such appointment, an appointment by the Board of Trade, on the application of any member, of an auditor for the current year (s. 112 (2)). The statute also provides for the appointment by the directors of the first auditors before the statutory meeting, and for the filling by the directors of a casual vacancy in the office of auditor (s. 112 (5) (6)). No director or officer of the company may be its auditor (s. 112 (3)). The remuneration of an auditor must be fixed by the company in general meeting, except that if appointed before the statutory meeting or to fill a casual vacancy his remuneration may be fixed by the directors (s. 112 (7)).

271. The auditor is *prima facie* not an officer of the company and the mere performance of an auditor's services on a particular occasion will not make him such, but he may be held to be an officer of the company if appointed to the office of auditor of the company.[3] Though the auditor of a company is an agent of the company, constructive notice of facts coming to his knowledge is not imputed to the shareholders.[4] While auditors' reports and the balance-sheets of a company are primarily addressed to the shareholders, they must be considered to be put into the hands of the public as well, and a member of the public is entitled to say that he purchased shares on the faith of their accuracy.[5]

272. Every auditor has at all times a right of access to the books and accounts and vouchers of the company, and is entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of his duty (s. 113 (1)).

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[1] *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407.

[2] *Gibson* v. *Barton*, 1874, L.R. 10 Q.B. 329.

[3] *Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617; contrast *Gibson* v. *Barton*, 1875, L.R. 10 Q.B. 329.

[4] *Spackman* v. *Evans*, 1868, L.R. 3 H.L. 171.

[5] *Lees* v. *Tod*, 1882, 9 R. 807.

273. Auditors are bound to make themselves acquainted with their duties under the Companies Acts,[1] and unless there be a special contract defining their duties and liabilities, to conform to the terms of the articles imposing exceptional duties upon them.[2] Directors are entitled to assume that auditors are doing their duty.[3] The main duty of the auditors of a company is to examine the company's accounts and the balance-sheet to be laid before the company in general meeting, and report (1) whether they have obtained all the information and explanations they have required, and (2) whether, in their opinion, the balance-sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shewn by the books of the company (s. 113 (2)). The duty so imposed on an auditor is not absolute, but depends upon the information given and explanations furnished to him, so that there is abundant room for discretion. But the onus lies on the auditor.[4] The business of the auditor is to ascertain and state the true financial position of the company at the time of the audit. He must make inquiry and take trouble to see that the books themselves shew the company's true position. But he is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not bound to be suspicious, but where there is something to excite his suspicion he must exercise more care. He may act upon the opinion of an expert where special knowledge is required, and he may rely upon the returns made by a competent and trusted expert, *e.g.* by a manager as to the values of stock-in-trade,[5] relating to matters on which information from such a person is essential.[6] An auditor is not justified in omitting to make personal inspection of securities that are in the custody of a person or company, *e.g.* stockbrokers, with whom it is not proper that they should be left, whenever such personal inspection is practicable. If he discovers that securities of the company are not in proper custody, it is his duty to require that the matter be put right at once, or if his requirement is not complied with, to report the fact to the shareholders, and this whether he can or cannot make a personal inspection.[7] On the other hand, it is no part of the auditor's duty to give advice either to directors or shareholders as to what they ought to do.[8] On completion of his inquiries the duty of the auditor is to convey information to the shareholders, and not merely so to express himself as to arouse inquiry.[1]

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[1] *Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139.

[2] *Kingston Cotton Mills Co.* (No. 2), [1896] 2 Ch. 279; *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407.

[3] *Dovey* v. *Cory*, [1901] A.C. 477.

[4] *In re City Equitable Fire Insurance Co.*, [1925] 1 Ch. 407.

[5] *Kingston Cotton Mills Co.* (No. 2), [1896] 2 Ch. 279.

[6] *Leeds Estate Building and Investment Co.* v. *Shepherd*, 1887, 36 Ch. D. 787; *In re Kingston Cotton Mills Co.* (No. 2), *supra*; *In re City Equitable Fire Insurance Co.*, *supra.*

[7] *In re City Equitable Fire Insurance Co.*, *supra.*

[8] Per Lindley L.J. in *In re London and General Bank* (No. 2), [1895] 2 Ch. 673.

274. An auditor may be sued by the company for a breach of his duty, *e.g.* where the result is a misapplication of the company's funds by payment of dividends out of capital.[2] If he is an officer of the company he may be proceeded against as for misfeasance in a winding-up (s. 215).[3] He may be ordered to deliver up books and papers subject to any lien he may have over them.[4]

275. The auditor's report must be attached to or referred to at the foot of the balance-sheet, and be read before the company in general meeting. It must be open to inspection by any shareholder, and, if required, a copy of the balance-sheet and report must be furnished to him at a stated charge (s. 113 (3)).[5] The balance-sheet must be signed by two directors on behalf of the board, or by a sole director; and the issuing, circulating, or publishing of the balance-sheet not so signed or without the report being attached or referred to involves penalties for default (s. 113 (4)). There are special requirements in the case of banking companies registered after 1879 (s. 113 (5)). A company is not entitled to contract itself by its articles or resolutions out of these obligations imposed by the Act on the company.[6] It is open to a company to say by its articles that as to particular items of its business secrecy shall be preserved, and that auditors who require to know all details for the purpose of their audit shall not, unless their duty so requires, disclose such details to the shareholders.[6] Where fraud is present, such clauses in the articles will not deprive shareholders of the right under control of the Court to ascertain the true position of the company.[7]

(iii) *Inspectors.*

276. On the application of a necessary minimum proportion in value or numbers of the members of a company the Board of Trade may appoint inspectors to investigate the affairs of the company and to report to the Board. The applicants are required to produce evidence that they have good reasons for the investigation and are not actuated by malicious motives, and may be required to give security for costs which they are required to pay unless the Board of Trade directs that they be paid by the company. The inspector is given the necessary powers to make his inquiry effective. On receipt of the inspector's report the Board of Trade sends a copy to the registered office of the company, and a further copy, if requested by the applicants, to them (s. 109). The company may itself by special resolution appoint inspectors, who have the same powers as those appointed by the Board of Trade (s. 110). A report by a Board of Trade inspector is not evidence receivable in any Court of justice of any fact mentioned in it. It binds no one, and has no effect upon the company.[1] A report by an inspector is, however, admissible as evidence of the opinion of the inspector in relation to any matter contained in the report (s. 111).

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[1] *In re London and General Bank* (No. 2), [1895] 2 Ch. 673.

[2] *Leeds Estate Building and Investment Co.* v. *Shepherd*, 1887, 36 Ch. D. 787.

[3] *In re London and General Bank, supra; In re Kingston Cotton Mills* (No. 2), *supra.*

[4] *Findlay* v. *Waddell*, 1910 S.C. 670.

[5] See *Davies* v. *Gas Light Co.*, [1909] 1 Ch. 708.

[6] *Newton* v. *Birmingham Small Arms Co.*, [1906] 2 Ch. 378.

[7] *Collins* v. *North British Bank*, 1850, 13 D. 349; 1 Macq. 369.

SUBSECTION (8).—*Dividends and Profits.*

277. The Act of 1908, except in Table A where applicable, does not contain any express provision as to payment of dividends, and although the powers of a company are limited by its objects the Act evidently treats the power to pay dividends as an object of every company, so obvious, so inherent, as not to need mention in the memorandum, but properly left to be dealt with and defined by the articles.[2] But payment of dividends out of capital, *i.e.* out of moneys subscribed on shares,[3] is *ultra vires* and contrary to the statute (except under s. 91), which impliedly if not expressly provides that the paid-up capital shall, subject to loss of which creditors take the risk, be retained and kept up as a fund to which creditors are entitled to look.[4] The statute allows of one exception (s. 91) in permitting, under elaborate conditions and restrictions, the payment of interest out of capital where shares of a company are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period, charging the same to capital as part of the cost of construction. Dividends accordingly may be paid out of profits and only out of profits (*cf.* Table A, Art. 97).

278. As to what profits are available for dividends, there is nothing in the Act of 1908 or in the general law to prevent the distribution by way of dividend of profits of any description,[5] whether arising from the business of the company or from other sources. If a company acquires assets and with them carries on business, every increment of value, whether by way of appreciation of the assets or by way of profit earned in employing them is in some sense profit.[6] But the House of Lords has declined to define what is profit and what capital in the abstract [7] in dealing with questions of dividends. The fact is that the law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits (*cf.* Table A, Art. 97).[8] The latter expression suggests that the capital must always be kept up and be represented by assets, which, if sold, would produce it. This is more than the law requires. Capital may be sunk and lost, and yet the excess of current receipts over current payments may be divided.[1] Profits may be considered as earned though they do not exist in the shape of money in the coffers of the company or its bankers, so that money has to be borrowed to pay the dividend.[2]

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[1] *Grosvenor and West End Railway Terminus Hotel*, 1897, 76 L.T. 337.

[2] Palmer's Company Law, 12th ed., p. 225; Table A, Art. 95; s. 39 (3).

[3] *Ammonia Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266, 292.

[4] *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Co.*, 1875, 1 Ch. D. 682; *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409; *Flitcroft's* case, 1882, 21 Ch. D. 519.

[5] *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198.

[6] Buckley on the Companies Acts, 10th ed., p. 622.

[7] See *Dovey* v. *Cory*, [1901] A.C. 477, 486.

[8] See Buckley on the Companies Acts, 10th ed., p. 665; *cf.* Table A, Art. 97; *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239, at p. 266.

279. Apart from specific definition in the articles the question arises whether a depreciation or loss of capital falls to be made up out of revenue before the profits arising on revenue account are available for dividend. Under the earlier decisions it was held they must be.[3] But subsequent decisions [4] appear to have departed from this rule, and to have made it permissible to apply profits on revenue account to dividend without keeping up fixed capital which had depreciated or been lost. It is clear that where circulating capital, *i.e.* capital which has been used in earning profits, has been lost it must be restored out of the profits before they can be applied to dividend. If, however, circulating capital on which no profits have been earned has been lost it need not under these decisions be replaced.[5] It is also clear under these decisions that where fixed capital, *i.e.* capital assets acquired for the purpose of being retained, have depreciated or been lost, profits on revenue account need not be applied to wiping out the debit on capital account so brought about.[6] This principle has been applied to the particular case of the wasting asset; and it was decided that a wasting asset need not be restored as it is consumed,[7] unless in the circumstances of the case it is to be regarded as circulating capital.[8] The validity of these decisions permitting the payment of dividends before replacing lost capital has however been doubted in the House of Lords in *Dovey* v. *Cory*,[9] particularly by Lord Davey, and they are the subject of controversy and discussion by text writers of eminence.[10] Since *Dovey's* case, however, these decisions have again been followed,[11] to the effect of holding that "when a company has in its first few years' trading suffered trading losses, which must necessarily have fallen on capital, as it had no profits, it may on subsequently commencing to earn profits divide the clear nett profits on its current trading without first making good out of revenue such early trading losses."[1]

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[1] *Verner, supra*; *Ammonia Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266; cf. *Stapley* v. *Read Bros.*, [1924] 2 Ch. 1; *Lawrence* v. *West Somerset Mineral Railway Co.*, [1918] 2 Ch. 250.

[2] *Stringer's* case, 1869, L.R. 4 Ch. 475.

[3] *Helby's* case, 1866, L.R. 2 Eq. 167 at p. 175; *Stringer's* case, 1869, L.R. 4 Ch. 475; *Rance's* case, 1870, L.R. 6 Ch. 104; *Davison* v. *Gillies*, 1889, 16 Ch. D. 347 n.; *In re Oxford Benefit, etc. Society*, 1886, 35 Ch. D. 502; and see per Stirling J. in *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239, and per Kay J. at p. 268; and per Chitty J. in *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198.

[4] *Lee* v. *Neuchatel Asphalte Co.*, 1889, 41 Ch. D. 1; *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; *Wilmer* v. *M'Namara & Co.*, [1895] 2 Ch. 245.

[5] *Ammonia Soda Co.* v. *Chamberlain*, [1918] 2 Ch. 266.

[6] *Lee*; *Verner*; *Wilmer, supra.*

[7] *Lee* v. *Neuchatel Asphalte Co., supra.*

[8] *Bond* v. *Barrow Haematite Co.*, [1902] 1 Ch. 353.

[9] [1901] A.C. 477.

[10] Palmer's Company Law, 12th ed., p. 227 *et seq.*; and see Buckley on the Companies Acts, 10th ed., p. 664 *et seq.*

[11] *Ammonia Soda Co., supra*; *Lawrence* v. *West Somerset Mineral Railway Co.*, [1918] 2 Ch. 250; *Stapley* v. *Read Bros.*, [1924] 2 Ch. 1.

280. The articles may, however, limit the funds which may be applied to dividends. Where the fund for payment of dividend is by the articles the profits "arising from the business of the company" (Table A, 1862 Act, Art. 73), it is necessary to consider upon the terms of the Memorandum of Association what is the business of the company in arriving at the profits of the business. The profits of the business are the credit balance of a profit and loss account properly prepared, having regard to the definition of the business in the Memorandum of Association. They are the excess of receipts over expenses on revenue account, and capital account and revenue account are *prima facie* to be treated as separate accounts.[2] But if there has been loss on revenue account not compensated by profit on capital account there is not profit available for dividend.[3] Under most articles, and particularly articles which justify the division of a credit balance on profit and loss account, although capital account may be in debit,[4] the appreciation would not be divisible, for it would not be "profit arising from the business."[5] The articles may, however, provide for the treatment of a realised credit balance on capital account as applicable for dividend. And it does not, in such a case, follow that when capital account is in debit, it must be made up from a credit balance on revenue account.[6]

281. In ascertaining what are profits available for dividend the following points may also be noted. Expenses properly chargeable to capital and to revenue respectively must be so charged.[7] This and the proper figures to be attributed to items in profit and loss are matters of estimate and opinion, and in many cases are for the shareholders themselves to determine,[8] within legal limits. Expenses properly chargeable to capital and charged to revenue account may subsequently be recharged to capital, and revenue account recouped.[9] Premiums on the issue of shares may be treated as profits.[10] Profits carried to reserve remain profits unless capitalised.[11] Goodwill is not profit for dividend.[12] A profit resulting from the payment by the company of its debentures at less than *par* cannot be distributed as dividend if there has been a corresponding depreciation in the value of the capital assets of the company.[1] Sums written off out of revenue for depreciation of capital assets,[2] or of goodwill,[3] and subsequently shewn on revaluation not to have been or to be required, may be written back to revenue account.

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[1] Buckley on the Companies Acts, 10th ed., p. 666; *Ammonia Soda Co.* v. *Chamberlain, supra.*

[2] Buckley on the Companies Acts, 10th ed., p. 663. [3] See Buckley, 10th ed., p. 663.

[4] *Wall* v. *London and Provincial Trust*, [1920] 1 Ch. 45; 2 Ch. 582.

[5] See Buckley on the Companies Acts, 10th ed., p. 667.

[6] *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198; *Foster* v. *New Trinidad Lake Asphalt Co.*, [1901] 1 Ch. 208; *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; *Bond* v. *Barrow Haematite Steel Co.*, [1902] 1 Ch. 353; *Ammonia Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266; *City Property Investment Corporation* v. *Thorburn*, 1897, 25 R. 361.

[7] *Lee* v. *Neuchatel Asphalte Co., supra; Mills* v. *Northern Rly. of Buenos Ayres*, 1870, L.R. 5 Ch. 621; *Jamaica Railway Co.* v. *Attorney-General of Jamaica*, [1893] A.C. 127, 136.

[8] See Buckley on the Companies Acts, 10th ed., pp. 662, 668.

[9] *Mills* v. *Northern Railway of Buenos Ayres*, 1870, L.R. 5 Ch. 621.

[10] *In re Hoare & Co., Ltd.*, [1904] 2 Ch. 208.

[11] *Bouch* v. *Sproule*, 1887, 12 App. Cas. 268, at p. 285.

[12] *In re Spanish Prospecting Co.*, [1911] 1 Ch. 92, at p. 105.

282. Dividends are sometimes guaranteed for several years by the vendor to the company. The question may arise on the construction of the agreement whether payments under the guarantee do not amount to paying dividends out of capital. If the guarantee merely narrates the personal liability of the guarantor the payments will be valid.[4] The agreement is void as against the creditors of the company if the dividends become payable directly or indirectly out of the purchase price.[5] But a guarantee to shareholders may not be an asset of the company at all.[6]

283. There is no principle which compels a company while a going concern to divide the whole of its profits among the shareholders. How the company shall deal with such profits is a matter of arrangement and internal economy,[7] *e.g.* subject to the memorandum and articles of association, it may form a reserve fund.[8] The questions whether profits have been earned and whether they shall be divided are primarily questions for the shareholders or directors to determine in accordance with the company's regulations, and provided they act honestly, and in accordance with such regulations, in coming to such determination, they discharge all the obligations imposed upon them by the Act.[9]

284. Until a dividend is declared it is not due.[10] Upon declaration it becomes a debt due by the company to the shareholders,[11] and in England is a specialty debt,[12] but directors who have passed a resolution to pay an interim dividend under powers in articles may validly rescind the resolution.[13]

285. The articles may regulate the manner in which a dividend may be declared (Table A, Arts. 95–98). Subject to the articles,[1] the company may pay the dividend to each shareholder in proportion to the number of shares held by him, and not in proportion to the amount of capital paid up on his shares,[2] but the articles may provide or, subject to the memorandum, may be altered to provide for paying dividend in proportion to capital paid up (s. 39 (3), Table A, Art. 98).[3] The persons entitled to receive the dividend *prima facie* are the persons whose names appear on the register of shareholders at the time of declaration, or their legal personal representatives if deceased,[4] and unless the articles otherwise provide they are entitled to be paid in cash.[5] Where shares are entitled to a preferential dividend at a specified rate per cent. the dividend is cumulative[6] unless otherwise clearly intended.[7] The articles may provide for the forfeiture of unclaimed dividends. The articles usually provide that no dividend shall bear interest against the company (Table A, Art. 102).

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[1] *Wall* v. *London and Provincial Trust*, [1920] 1 Ch. 45; 2 Ch. 582.

[2] *Ammonia Soda Co.* v. *Chamberlain*, [1918] 1 Ch. 266.

[3] *Stapley* v. *Read Bros.*, [1924] 2 Ch. 1.

[4] *In re South Llanharran Colliery Co.*, 1879, 12 Ch. D. 503; *Re Gelly Deg Colliery Co.*, 1878, 38 L.T. 440.

[5] *In re Stuart's Trusts*, 1876, 4 Ch. D. 213; *Richardson* v. *English Crown Spelter Co.*, 1885, W.N. 31; *In re Menell & Cie*, [1915] 1 Ch. 759.

[6] *Stark* v. *Fife and Kinross Coal Co.*, 1899, 1 F. 1173.

[7] Palmer's Company Law, 12th ed., p. 225.

[8] *Burland* v. *Earle*, [1902] A.C. 83, per Lord Davey; *Evling* v. *Israel & Oppenheimer, Ltd.*, [1918] 1 Ch. 101.

[9] Buckley on the Companies Acts, 10th ed., p. 661; *Dovey* v. *Cory*, [1901] A.C. 477; *Jamaica Railway Co.* v. *Attorney-General of Jamaica*, [1893] A.C. 127, 136; cf. *Burland* v. *Earle*, *supra*; *Wemyss Collieries Trust* v. *Melville*, 1905, 8 F. 143.

[10] *Bond* v. *Barrow Haematite Steel Co.*, [1902] 1 Ch. 353.

[11] *Carron Co.* v. *Hunter*, 1868, 6 M. (H.L.) 10.

[12] *In re Artizans Land and Mortgage Corporation*, [1904] 1 Ch. 796.

[13] *Lagunas Nitrate Co.* v. *Schroeder & Co.*, 1901, 85 L.T. 22.

286. Directors may be liable as for a breach of trust in paying dividend out of capital, and are *prima facie* liable jointly and severally to repay to the company the amount,[8] but "the Court will not lightly interfere with a dividend *bona fide* declared after proper investigation," though it be based on an erroneous estimate,[9] or on an untrue statement of accounts which the director sued believed on reasonable grounds to be true.[10]

287. The profits of a company available for dividend may, subject to the memorandum and articles, be dealt with in various recognised ways besides distribution in dividends. Thus they may be retained at credit of profit and loss account simply, or placed to reserve (Table A, Art. 99),[11] or to a sinking fund,[12] or applied in remuneration, *e.g.* of directors, by way of share of profits under agreements to that end,[13] or they may be capitalised or used to repay shareholders the amount paid up on their shares (s. 40).[1] A company requires no express power to invest the funds reserved, and is not restricted to the employment of such money in its own business. The directors may invest reserved funds in securities outwith the powers of trustees, subject only to the control of the shareholders in general meeting.[2] It is *intra vires* of a company for the articles to provide for the creation of a private or secret reserve and for its non-disclosure in the company's balance-sheet, subject to the auditors disclosing the details if their duty so requires.[3] Profits put to reserve remain profits unless and until effectually capitalised.[4]

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[1] *Oakbank Oil Co.* v. *Crum*, 1882, 8 App. Cas. 65; *Hoggan* v. *Tharsis Sulphur and Copper Co.*, 1882, 9 R. 1191.

[2] *Oakbank Oil Co.*, *supra*; cf. *In re Bridgewater Navigation Co.*, 1889, 14 App. Cas. 525.

[3] Cf. *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361.

[4] *James* v. *Buena Ventura Nitrate Grounds Syndicate*, [1896] 1 Ch. 456, 457.

[5] *Hoole* v. *Great Western Railway Co.*, 1867, L.R. 3 Ch. 262; *Wood* v. *Odessa Waterworks Co.*, 1889, 42 Ch. D. 636.

[6] *Henry* v. *Great Northern Railway Co.*, 1857, 1 De G. & J. 656; *Webb* v. *Earle*, 1875, L.R. 20 Eq. 556.

[7] *Staples* v. *Eastman Photographic Materials Co.*, [1896] 2 Ch. 303; *Foster* v. *Coles*, [1906] W.N. 107; *Partick, Hillhead, and Maryhill Gas Co.* v. *Taylor*, 1888, 15 R. 711; *Miln* v. *Arizona Copper Co.*, 1899, 1 F. 935.

[8] *Flitcroft's* case, 1882, 21 Ch. D. 519; *Stringer's* case, 1869, L.R. 4 Ch. 475; *Rance's* case, 1870, L.R. 6 Ch. 104; *In re National Funds Assurance Co.*, 1878, 10 Ch. D. 118; *In re Alexandra Palace Co.*, 1882, 21 Ch. D. 149; *In re Denham & Co.*, 1883, 25 Ch. D. 752; *In re Sharpe*, [1892] 1 Ch. 154.

[9] *Stringer's* case, 1869, L.R. 4 Ch. 475; *City of Glasgow Bank* v. *Mackinnon*, 1882, 9 R. 535.

[10] *Dovey* v. *Cory*, [1902] A.C. 477, 490; *In re Denham & Co.*, *supra*.

[11] *Burland* v. *Earle*, [1902] A.C. 83; *Wemyss Collieries Trust, Ltd.* v. *Melville*, 1905, 8 F. 143; *Scottish Investment Trust*, 1901, 9 S.L.T. 299; *Evling* v. *Israel & Oppenheimer, Ltd.*, [1918] 1 Ch. 101; contrast *Paterson* v. *R. Paterson & Sons*, 1917 S.C. (H.L.) 13.

[12] *Arizona Copper Co.* v. *London Scottish American Trust*, 1897, 24 R. 658.

[13] *In re Spanish Prospecting Co.*, [1911] 1 Ch. 92.

288. Undivided profits of a company may be capitalised if the constitution of the company so allows. This may be done by the return of accumulated profits so as to increase the liability on paid-up capital (s. 40). The effect is to transfer the returned funds from revenue to capital account.[5] Or it may be done by applying reserve profits to making partly paid-up shares further paid up. This can be done by declaring a bonus out of such profits and making a call payable at the same date. Or it may be done by issuing bonus shares in satisfaction of a bonus or dividend declared out of such profits,[6] or even without declaring a bonus.[7] The question whether profits have been capitalised or not is illustrated by the cases between fiar and liferenter, the question whether a liferenter is entitled to the whole or only the income produced by the bonus depending on whether the distribution is in substance a return by way of dividend or represents truly an interest in the capital of the company.[8] In such cases the Court looks both to the substance and form of the transaction as determining factors in the solution of the question whether the company has distributed the accumulated profits as dividend or has converted them into capital.[9]

SECTION 12.—POWERS AND LIABILITIES OF A COMPANY.

SUBSECTION (1).—*Powers of a Company.*

289. In Scotland the powers of a common law incorporation to contract appear to be limited by the objects of its incorporation ;[10] but a corporation created by statute is limited as to its powers by the purposes of incorporation as defined by the statute.[1] The objects which the corporation may legitimately pursue must be ascertained from the Act itself, and the powers which the corporation may lawfully use in furtherance of these objects must be either expressly conferred in or derived by reasonable implication from its provisions.[2] A company incorporated under the Companies Acts is thus limited as to its powers by the Companies Acts, and by the conditions contained in its memorandum of association,[3] and these latter are unalterable except in the cases and in the mode and to the extent for which express provision is made in the Act (s. 7). Thus a company cannot employ its funds for the purposes of any transactions which do not come within its objects as defined in the memorandum (ss. 3, 4, and 5).[4] All persons dealing with the company are entitled to rely on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.[5]

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[1] See s. 7 (8) (ii) (*a*), *supra*.

[2] *Burland* v. *Earle*, *supra*.

[3] See Buckley J. in *Newton* v. *Birmingham Small Arms Co.*, [1906] 2 Ch. 378.

[4] *Partick, Hillhead, and Maryhill Gas Co.* v. *Taylor*, 1891, 18 R. 1017 ; *Bouch* v. *Sproule*, 1887, 12 App. Cas. 385.

[5] See *supra*, para. 95.

[6] See Palmer's Company Law, 12th ed., p. 234 *et seq.*

[7] *Swan Brewery Co.* v. *The King*, [1914] A.C. 231.

[8] *Bouch* v. *Sproule*, 1887, 12 App. Cas. 285 ; *Blyth's Trs.* v. *Milne*, 1905, 7 F. 799 ; *Howard's Trs.* v. *Howard*, 1907 S.C. 1274 ; *Gunnis' Trs.* v. *Gunnis*, 1903, 6 F. 104 ; *Cunliff's Trs.* v. *Cunliff*, 1900, 3 F. 202.

[9] *Bouch* v. *Sproule*, *supra*.

[10] *E.g. Henderson* v. *S.S.C. Society Widows' Scheme Contributors*, 1842, 4 D. 370 ; *Kesson* v. *Aberdeen Wrights' and Coopers' Incorporation*, 1898, 1 F. 36 ; and see Gloag on Contract, 134 *et seq.*

290. An act which is *ultra vires* of the company is incapable of ratification by the company,[6] and any shareholder may get an interdict to restrain it.[7] Bar or estoppel does not apply in the case of an act *ultra vires* of the company.[8] But if a shareholder has assented to an *ultra vires* act and benefited by it, he cannot afterwards challenge it.[9] An act *ultra vires* of the company is to be distinguished from an act *ultra vires* merely of the directors,[10] which may be ratified by the company,[11] and to such an act the principle of bar or estoppel applies.[12] The doctrine of *ultra vires* is, however, to be reasonably understood and applied, and whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorised will not (unless expressly prohibited by the memorandum of the company) be held *ultra vires*.[13]

291. The Companies Act, 1908, confers numerous specific powers on a company, and also imposes various duties and obligations inferring a corresponding power to implement them.[14] In particular it allows of the alteration of the memorandum of association of a company in certain cases and modes, and to a certain extent, expressly provided in the Act (s. 7).[1] Apart from such specific powers, the powers of a company are limited by its objects as defined in the third or objects clause of its memorandum of association. The powers which the company possesses or requires for the purpose of carrying out its objects should be contained in the articles of association.[2] Powers in the articles which go beyond the area of the company's actions as defined in the memorandum and the Acts are inoperative.[3]

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[1] *Ashbury Rly., etc. Co.* v. *Riche*, 1875, L.R. 7 H.L. 628, at pp. 653, 693; *Nicol* v. *Dundee Harbour Trs.*, 1914 S.C. 374.

[2] *Baroness Wenlock* v. *Dee River Co.*, 1885, 10 App. Cas. 354, at p. 362.

[3] *Ashbury Rly., etc. Co.* v. *Riche*, *supra*.

[4] *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409, at p. 414.

[5] *Ibid.*, at p. 415.

[6] *Ashbury Rly., etc. Co.* v. *Riche*, *supra*, at p. 695; *General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282, at p. 291; *Pacific Coast Coal Mines* v. *Arbuthnot*, [1917] A.C. 607.

[7] *Simpson* v. *Westminster Palace Hotel Co.*, 1860, 8 H.L.C. 712; *Lee* v. *Crawford*, 1890, 17 R. 1094, per Lord Kyllachy; *Smith* v. *Glasgow and South-Western Rly. Co.*, 1897 (O.H.), 4 S.L.T. 351; *Burns* v. *North British Rly. Co.*, 1863, 36 Sc. Jur. 286.

[8] *In re Home and Foreign Investments, etc. Co.*, [1912] 1 Ch. 81.

[9] *Towers* v. *African Tug Co.*, [1904] 1 Ch. 558.

[10] *Irvine* v. *Union Bank of Australia*, 1877, 2 App. Cas. 366, 374.

[11] *Ashbury Rly., etc. Co.* v. *Riche*, *supra*.

[12] *London and New York Investment Corpn.*, [1895] 2 Ch. 860.

[13] *Att.-Gen.* v. *Great Eastern Rly. Co.*, 1880, 5 App. Cas. 473, at p. 478.

[14] For an enumeration of their powers and duties and the relative sections of the Act of 1908, see Palmer's Company Law, 12th ed., p. 76 *et seq.*

292. Thus, whether apart from specific powers given by the Acts any given transaction is or is not within the powers of a company is a question of law depending on the construction to be placed on the objects clause of the memorandum of association.[4] In particular the rule *noscitur a sociis* falls to be applied, but this rule is not to be stretched in a question of *ultra vires* to the effect of ascertaining what is the main or dominant object of a company, and treating all other paragraphs, however generally expressed, as merely ancillary to the main object, and as limited and controlled thereby.[5] An interpretation clause in the memorandum by which all enumerated objects in separate paragraphs are to be construed as independent objects with a view to entitling the company to carry out a multitude of objects and powers may be an abuse of and non-compliance with the statute as to defining the objects of the company (s. 3). But if the company's memorandum contains such a clause, the Court must give effect to it.[6]

293. The objects clause of most companies concludes with such general words as "and the doing all such other things as are incidental or conducive to the attainment of the above objects or any of them." [7] Such a phrase, it is thought, cannot extend the powers of a company to carry on business or enter into transactions not authorised by the clause or clauses defining the main object or objects of the company; [8] but such words have been relied on as enlarging the company's powers,[9] and should, it is thought, be limited to such things as are naturally conducive to the objects specified—*i.e.* things *bona fide* connected with the objects to be attained, and in the ordinary course of business adapted to their attainment.[10] An ambiguity in the memorandum is to be reasonably construed, and for purposes of construction upon points which the statute does not require to be contained in the memorandum as the dominant instrument, the memorandum and articles, as contemporaneous documents, are to be read together, with a view to explaining what may be ambiguous in the memorandum,[1] or to supplement it as to that upon which it is silent.[2]

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[1] As to alterations of the other statutory clauses see *supra*.

[2] *Cotman* v. *Brougham*, [1918] A.C. 514.

[3] *Ashbury Railway Carriage Co.* v. *Riche*, 1875, L.R. 7 H.L. 625.

[4] Per L. C. Campbell in *Simpson* v. *Westminster Palace Hotel Co.*, 1860, 8 H.L.C. 712; as to the rules of construction, see Palmer's Company Law, 12th ed., p. 69 *et seq.*

[5] See Lord Parker in *Cotman* v. *Brougham*, [1918] A.C. 514; Palmer's Company Law, 12th ed., p. 71 *et seq.*

[6] *Cotman* v. *Brougham*, *supra*; and see *London and Edinburgh Shipping Co.*, 1909, S.C. 1.

[7] *Cf.* Act of 1908, Third Sched., Form A.

[8] See Palmer's Company Law, 12th ed., p. 73; *Life Association of Scotland* v. *Caledonian Heritable Security Co.*, 1886, 13 R. 750; *Simpson* v. *Westminster Palace Hotel Co.*, 1860, 8 H.L.C. 712.

[9] *Evans* v. *Brunner, Mond & Co.*, [1921] 1 Ch. 359; *Peruvian Rlys. Co.* v. *Thames and Mersey Marine Insurance Co.*, 1867, L.R. 2 Ch. 617.

[10] *Joint Stock Discount Co.* v. *Brown*, 1866, L.R. 3 Eq. 139; and see Palmer's Company Law, 12th ed., p. 73.

294. It has been held that power to do such things as are ordinarily and reasonably done in such business as the company carries on may be implied though not referred to in the memorandum or articles—*e.g.* power in a trading company to borrow money as incidental to carrying on its business,[3] and to give reasonable security;[4] or may be inferred from a consideration of the other powers or objects therein expressed. In order to prevent any question as to the powers of the company it is usual to insert such powers as are above indicated in the objects clause,[5] but in many such cases the appropriate place is in the articles.[6] In Scotland accordingly it has been held that a trading company may, while it is a going company, vote a gratuity to its officers.[7] A trading company, if authorised by its constitution to take shares in another company, may take them in security.[8] A company may sue or be sued in respect of a libel.[9] It may compromise claims and disputes.[10] It may, having power to borrow, grant heritable security.[11] It may, having lent money on a second bond, buy in the property when exposed by the first bondholder.[11] But it may not, in the latter case, grant a bond of corroboration of the first bond or a cautionary obligation to the first bondholder.[12] On the other hand it is *ultra vires* of a company to purchase its own shares,[13] although it may hold its own shares in trust for a class of shareholders;[14] or to accept a surrender of shares which will result in an illegal reduction of capital;[15] or to issue its shares at a discount;[1] or to pay dividends out of capital;[2] or for a guarantee company to grant security over the guarantee fund.[3]

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[1] *In re Southern Brazilian, etc. Rly. Co.*, [1905] 2 Ch. 78, 84; *Anderson's* case, 1877, 1 Ch. D. 75, at pp. 99, 106.

[2] *Harrison* v. *Mexican Rly. Co.*, 1875, L.R. 19 Eq. 358.

[3] *General Auction Estate Co.* v. *Smith*, [1891] 3 Ch. 432.

[4] *In re Patent File Co.*, 1870, L.R. 6 Ch. 83.

[5] See Palmer's Company Law, 12th ed., p. 63 *et seq.*, and Wilton's Company Forms in Scotland, p. 29 *et seq.*

[6] *Cotman* v. *Brougham*, [1918] A.C. 514.

[7] *Fraser* v. *City of Glasgow Bank*, 1880, 7 R. 961; *Cameron* v. *Glenmorangie Distillery Co.*, 1896, 23 R. 1092; *Mackison's Tr.* v. *Burgh of Dundee*, 1909 S.C. 971; affd. 1910 S.C. (H.L.), 27.

[8] *Fraser* v. *City of Glasgow Bank*, 1879, 6 R. 1259.

[9] *Gordon* v. *British and Foreign Metaline Co.*, 1886, 14 R. 75; *British Legal Life Assurance, etc. Co.* v. *Pearl Life Assurance Co.*, 1887, 14 R. 818.

[10] *Assets Co.* v. *Guild*, 1885, 13 R. 281.

[11] *Paterson's Trs.* v. *Caledonian Heritable Security Co.*, 1885, 13 R. 369.

[12] *Shiell's Trs.* v. *Scottish Property Investment Building Society*, 1884, 12 R. (H.L.) 14; *Life Association of Scotland* v. *Caledonian Heritable Security Co.*, 1886, 13 R. 750.

[13] *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409; *General Property Investment Co.* v. *Matheson's Trs.*, 1888, 16 R. 282; *Cree* v. *Somervail*, 1879, 6 R. (H.L.) 90.

[14] *Gill* v. *Arizona Copper Co.*, 1900, 2 F. 843.

[15] *General Property Investment Co.* v. *Craig*, 1891, 18 R. 389.

SUBSECTION (2).—*Alteration of Objects.*

(i) *Principles.*

295. Alteration of the objects of a company may be effected apart from the Companies Acts by special Act of Parliament. Under the provisions of the Companies Acts alteration of objects may be effected by voluntary winding-up followed by reconstruction (s. 192), or by sale under the memorandum followed by winding-up[4] or without winding-up in certain limited respects defined in the Act of 1908[5] (ss. 9 and 264); otherwise the objects of a company are unalterable.[6] The respects in which the objects may be altered under the Act of 1908 are so far as may be required to enable the company to carry on its business more economically or more efficiently,[7] to attain its main purpose by new or improved means,[8] to enlarge or change the local area of its operations,[9] to carry on some business which under existing circumstances may conveniently or advantageously be combined with its business,[10] or to restrict or abandon any of its objects (s. 9 (1)).[11] A company may also, with or without alteration of its objects, alter the form of its constitution by substituting a memorandum and articles for a deed of settlement.[12] In the last connection deed of settlement includes any contract of co-partnery or other instrument constituting or regulating the company, not being an Act of Parliament, a royal charter, or letters patent (s. 264 (4)).

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[1] *Klenck* v. *East India Co.*, 1888, 16 R. 271; *Ooregum Gold Mining Co.* v. *Roper*, [1892] A.C. 125.

[2] See Buckley, p. 144.

[3] *Robertson* v. *British Linen Co.*, 1891, 18 R. 1225.

[4] See Palmer's Company Law, 455.

[5] But see Companies (Converted Societies) Act, 1910.

[6] See *Glasgow Tramways and Omnibus Co.* v. *Glasgow Mags.*, 1891, 18 R. 675; cf. *In re J. A. Nordberg, Ltd.*, [1915] 2 Ch. 439.

[7] *J. & P. Coats*, 1900, 2 F. 829; *Scottish American Investment Co.*, 1891, 28 S.L.R. 421; *In re Cyclists' Touring Club*, [1907] 1 Ch. 269; *In re Reversionary Interest Society*, [1892] 1 Ch. 615.

[8] *In re Governments Stock Investment Co.*, [1891] 1 Ch. 649; *Kirkcaldy Café Co.*, 1921 S.C. 681; *Incorporated Glasgow Dental Hospital* v. *Lord Advocate*, 1927 S.N. 30.

[9] *Kirkcaldy Steam Laundry Co.*, 1904, 6 F. 778; *Scottish American Investment Co.*, 1891, 28 S.L.R. 421; 1922, Oct. N.R.; *In re Trust and Agency Co. of Australasia*, 1908, 25 T.L.R. 61.

[10] *In re Cyclists' Touring Club*, [1907] 1 Ch. 269; *In re National Boiler Insurance Co.*, [1892] 1 Ch. 306; *Scottish Employers' Liability Assurance Co.*, 1896, 23 R. 1016; *Scottish Accident Insurance Co.*, 1896, 23 R. 586; *Northern Accident Insurance Co.*, 1893, 30 S.L.R. 834; *Scottish American Investment Co., supra*; *King Line*, 1902, 4 F. 504; *North of Scotland and Orkney and Shetland Steam Navigation*, 1920 S.C. 633; *In re Parent Tyre Co.*, [1923] 2 Ch. 222; *Edinburgh Southern Cemetery*, 1923 S.C. 867; *Western Ranches* v. *Nelson*, 1899, 1 F. 812; *In re John Brown, Ltd.*, 1914, 84 L.J. Ch. 245.

[11] *Kirkcaldy Café Co.*, 1921 S.C. 681.

[12] *Proprietors of Royal Exchange Buildings, Glasgow*, 1911 S.C. 1337; *In re Reversionary Interest Society*, [1892] 1 Ch. 615; *In re Braintree and Bocking Gas Co.*, [1920] 2 Ch. 12; *London and Edinburgh Shipping Co.*, 1909 S.C. 1; *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 633.

296. These provisions for alteration of objects apply alike to companies formed and registered under the Act of 1908 and to existing companies (s. 285), including companies registered but not formed under the Joint Stock Companies Acts, 1856 and 1857, or the Companies Act, 1862, companies registered but not formed under the Act of 1908 (s. 246), and unlimited companies.[1] The power of alteration is, however, confined to the particular matters specified in the Act, and does not apply to a case where a company cannot get on without a proposed alteration not "required to enable" the company to do any of the specified matters.[2] The Court, however, places a liberal construction on the provisions of the Act, and may allow companies to free themselves to a limited extent from the restrictions imposed by the terms of their original constitutions.[3] The Court will sanction alterations by which the original objects clause is recast or rewritten in modern form with the addition of new powers if required to place the company on an equality with more recently formed companies, and to remove doubt as to the extent of the company's ancillary powers;[4] but it will not sanction powers of unlimited extent,[5] and may require part of a proposed alteration to be deleted or qualifying words inserted.[6] The Court in Scotland, differing from that in England,[7] refuses to sanction an object to sell or dispose of the whole assets or undertakings, because such a sale, by way of amalgamation or otherwise, cannot, according to an English decision[8] as interpreted by the Court of Session, be a corporate object,[9] but, somewhat inconsistently, passes such a power if contained in the original memorandum.[10] Also differing from the English Courts,[11] and upon the same reasoning the Court of Session refuses to sanction a power to lease the whole undertaking of the company.[12] The Court will sanction a power to procure a company's recognition or registration abroad, but not a power to secure its incorporation under foreign laws.[12] The Court will sanction the inclusion of a power to borrow in the objects of a company not having impliedly such a power, or an alteration removing a restriction upon borrowing,[1] or a power to invest surplus funds, although such powers are strictly appropriate for regulation by the Articles of Association.[2] Any modification of the conditions of the memorandum of a company in respect of the statutory particulars required to be stated therein, if inconsistent with the recognised principles of company law, *e.g.* if amounting to a withdrawal of capital from the objects for which the company was incorporated,[3] would, presumably, not be sanctioned by the Court.[4]

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[1] *In re North of England Iron Steamship Insurance Association*, [1900] 1 Ch. 481.

[2] *In re Governments Stock Investment Co.*, [1891] 1 Ch. 649.

[3] *E.g. Glasgow Tramways and Omnibus Co.* v. *Glasgow Mags.*, 1891, 18 R. 675.

[4] *London and Edinburgh Shipping Co.*, 1909 S.C. 1; *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 633; *Edinburgh Southern Cemetery Co.*, 1923 S.C. 867; *In re New Westminster Brewery Co.*, [1911] W.N. 247; *In re John Brown, Ltd.*, [1914] W.N. 434; *In re Marshall, Sons & Co.*, [1919] W.N. 207, but *contra In re Consett Iron Co.*, [1901] 1 Ch. 236 should not be followed.

[5] *In re John Brown, Ltd.*, *supra*.

[6] Sec. 9 (4); *e.g. Glasgow Tramway and Omnibus Co.* v. *Glasgow Mags.*, 1891, 18 R. 675.

[7] *In re Marshall, Sons & Co.*, *supra*, but see *In re Sandwell Park Colliery Co.*, [1914] 1 Ch. 589.

[8] *Bisgood* v. *Henderson's Transvaal Estates, Ltd.*, [1908] 1 Ch. 743; see Palmer's Company Law, 12th ed., p. 66.

[9] *John Walker & Sons*, 1914 S.C. 280; *Union Bank of Scotland*, 1918 S.C. 21; *Aberdeen Steam Navigation Co.*, 1919 S.C. 464; *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 633; *Tayside Floorcloth Co.*, 1923 S.C. 590.

[10] *King Line*, 1902, 4 F. 504; *Macfarlane, Strang & Co.*, 1915 S.C. 196.

[11] *In re Anglo-American Telegraph Co.*, [1911] W.N. 248.

[12] *Tayside Floorcloth Co.*, *supra*.

297. Where the alteration proposed is with a view to additional business, it should not be subversive of or inconsistent with the existing business of the company, and ought to leave that existing business substantially as it was before, but with the convenience or advantage of such additional business.[5] Whether the new business is such as can be conveniently or advantageously combined with the existing business is a business question primarily for the company and its directors.[6] The additional business may have no true relation to the original business,[7] and the prospect of undertaking it need not be immediate.[8] Merely subsidiary additional business or objects will readily be sanctioned.[9] The Court may or may not impose the alteration of the name of the company as a condition of its sanction of an alteration providing for additional business.[10] A company may, of course, cease any particular branch of its business without any express authority, so long as it does not cease altogether to carry on the business for which it was formed.[11]

(ii) *Procedure.*

298. The Act of 1908 prescribes, as the mode in which an alteration of a company's objects may be effected under the Act, a special resolution of the company and confirmation of the alteration by the Court on petition (ss. 9 and 264). But the Court must be satisfied (*a*) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and (*b*) that, with respect to every creditor who in the opinion of the Court is entitled to object, and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained, or his debt or claim has been discharged or has determined, or has been secured to the satisfaction of the Court, and may for special reasons dispense with notice to any persons or class of persons (s. 9 (3)). In exercising its discretion the Court is to have regard to the rights and interests of the members of the company, or any class of them, as well as to those of creditors, and may order an arrangement to be made to its satisfaction for the purchase of the interests of dissentient members (s. 9 (5)). The Court will adjourn or sist proceedings to enable any such arrangement to be carried out, or give directions or orders to facilitate it. No part of the share capital of the company can be expended on the purchase of the interests of dissentient members (s. 9 (5)). An office or, according to Scottish practice, certified copy of the confirmation order, together with a printed copy of the memorandum as altered, must be delivered to the registrar within fifteen days from its date. The Court may extend the time for the delivery of the documents in question for any period it deems proper (s. 9 (6)). For every day the Company is in default it is liable to a fine not exceeding £10 (s. 9 (7)). Upon the issue by the registrar of a certificate of registration, the altered memorandum becomes the memorandum of the company, and the certificate is conclusive evidence of compliance with all statutory requirements with respect to the alteration and its confirmation (s. 9 (6)). An unlimited company registered as such under the Act, proposing to alter its objects or its constitution and become a company limited by shares, must re-register as a limited company (s. 57) before it takes the necessary steps for the carrying of the special resolution altering its constitutional objects.[1] Companies registering in pursuance of the provisions of Part VII. of the Act with a constitution in the form of a deed of settlement, contract of co-partnery, or other deed, and applying to the Court for alteration of that constitution with the substitution therefor of a Memorandum of Association (ss. 263, 264), may make subsequent application for alteration under s. 9. A company registered under the Act of 1862, with unlimited liability and with a deed of settlement, and re-registering as a limited company, makes application under sec. 9 when seeking judicial confirmation for the substitution of a Memorandum and Articles of Association with altered objects.[1] A company substituting a memorandum and articles for a deed of settlement without making any alteration of its objects requires judicial confirmation of such substitution as an alteration.[2] Upon confirmation (evidenced by a certified copy of the order of the Court) a printed copy of the memorandum and articles is filed for registration (s. 264 (2) (*a*)). On registration the substituted memorandum and articles apply to the company as if it had been a company originally registered with such documents, and the old constitution ceases to apply to it (s. 264 (2) (*b*)). A company constituted by deed of settlement, supplemented by private Acts, can take advantage of the Act of 1908 to alter its constitution in so far as the private Acts are not thereby affected.[1]

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[1] *In re Reversionary Interest Society*, [1892] 1 Ch. 615.

[2] See Wilton on Alteration of Memorandum of Association, p. 28.

[3] *Guinness* v. *Land Corporation of Ireland*, 1882, 22 Ch. D. 349.

[4] See Wilton, *op. cit.*, p. 28.

[5] *In re Cyclists' Touring Club*, [1907] 1 Ch. 269.

[6] *In re Parent Tyre Co.*, [1923] 2 Ch. 222.

[7] *In re Parent Tyre Co.*, *supra*; but see *Edinburgh Southern Cemetery*, 1923 S.C. 867; *Western Ranches* v. *Nelson's Trs.*, 1899, 1 F. 812; *Glasgow Tramway and Omnibus Co.* v. *Glasgow Mags.*, 1891, 18 R. 675.

[8] Lord Kinnear's opinion to the contrary in *Glasgow Tramway and Omnibus Co.* v. *Glasgow Mags.*, 1891, 18 R. 675; and *Young's Paraffin Light and Mineral Oil Co.*, 1894, 21 R. 384, are not now followed. See Wilton on Alteration of Memorandum of Association, p. 37.

[9] *In re John Brown, Ltd.*, *supra*.

[10] *Scottish Employers' Liability Accident Assurance Co.*, 1896, 23 R. 1016; *Scottish Accident Insurance Co.*, 1896, 23 R. 586; *King Line*, 1902, 4 F. 504; *contra*, *Northern Accident Insurance Co.*, 1893, 30 S.L.R. 834; *Scottish American Investment Co.*, 1891, 28 S.L.R. 421; 1922, Oct. n.r.; *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 633.

[11] *In re Jewish Colonial Trust*, [1908] 2 Ch. 287.

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[1] *Proprietors of Royal Exchange Buildings, Glasgow*, 1911 S.C. 1337.

[2] *In re Braintree and Bocking Gas Co.*, [1920] 2 Ch. 12.

299. On the passing of the special resolution for alteration of the company's objects, and presentation of the petition to one of the divisions of the Court of Session, the Court orders intimation on the walls and in the minute book and advertisement. Usually the order simply directs the dependence of the petition to be advertised in one or more newspapers without any specification of the precise terms of the alteration.[2] But full information should usually be given to the shareholders in anticipation of the special resolution.[3] After intimation and advertisement of the petition the Court of Session remits the proceedings to a solicitor for inquiry as to their regularity, but evidence may possibly be required to be led.[4] If unopposed, and the report be favourable, the petition may, on notice to the keeper of the rolls, be disposed of *de plano*.[5] Creditors, as well as shareholders, may oppose.[6] Persons with interests entirely outside the company, as rival traders or otherwise, have no right of opposition.[7] The Court will allow petitions to be amended to the extent of authorising procedure *de novo*.[8] The Court may, where it desires to impose any modifications upon any special resolution altering objects, remit or refer these to the company in general meeting.[9] Where the alterations are not approved *simpliciter* by the Court, it may order a print shewing the final form of the alteration, authenticated by the Clerk of Court or counsel, to be preserved in the process.[10] The memorandum, as altered, should be a complete document in itself.[11] The final interlocutor of the Court is not directed to be advertised, a certified copy of the order being filed by the agents with the registrar. Applications for confirmation can be presented and disposed of in vacation.[12]

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[1] *In re Reversionary Interest Society*, [1892], 1 Ch. 615.

[2] *E.g. In re Atlantic Patent Fuel Co.*, [1917] W.N. 214, 253; Gazette, 29th May 1914, of *Tharsis Sulphur and Copper Co.*; *In re Cork Employers' Federation*, [1921] 1 I.R. 69; but see *Scottish Employers' Liability Assurance Co.*, 1896, 23 R. 1016; *In re John Brown, Ltd.*, 1914, 84 L.J. Ch. 245.

[3] *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 94, 633.

[4] *Edinburgh Southern Cemetery Co.*, 1923 S.C. 867.

[5] *General Accident Assurance Corporation*, 1906, 8 F. 483.

[6] *Western Ranches, Ltd.* v. *Nelson's Trs.*, 1899, 1 F. 812; *Glasgow Tramway and Omnibus Co.* v. *Glasgow Mags.*, 1891, 18 R. 675.

[7] *In re Hearts of Oak Life and General Assurance Co.*, [1920] 1 Ch. 544.

[8] *North of Scotland and Orkney and Shetland Steam Navigation Co.*, 1920 S.C. 94, 633; *Kirkcaldy Café Co.*, 1921 S.C. 681.

[9] *Kirkcaldy Café Co.*, 1921 S.C. 681.

[10] *Union Bank of Scotland*, 1918 S.C. 21.

[11] *Proprietors of Royal Exchange Buildings, Glasgow*, 1911 S.C. 1337.

[12] *Ibid.*, per L. P. Dunedin.

SUBSECTION (3).—*Exercise of a Company's Powers.*

(i) *Agency.*

(a) *Employment of Agents by a Company.*

300. The objects of a company can only be accomplished through the agency of individuals.[1] The company in general acts through its directors, who are, in the eye of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors.[2] The authority of the agents of a company to act for it may be expressed through a resolution of the company in general meeting or by provision in the Articles of Association. The articles of a company commonly provide that the directors may exercise all such powers of the company as are not by the Act of 1908 or the articles required to be exercised by the company in general meeting.

A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorised officer of the company, and need not be under its common seal (s. 117).

301. The executive of the company is entitled to use its common seal.[3] Where the articles of the company regulate the manner of use of the common seal persons dealing with the company are bound to see that the seal is affixed in accordance with the articles. The company is bound, if on the face of the deed all is regular, unless the seal has been affixed fraudulently by the secretary for his own ends.[4] Where the presumption of regularity does not apply, an instrument to which the seal has been irregularly affixed is inoperative.[5]

(b) *Liability of a Company for the Acts of its Agents.*

302. A company is liable for the actings of its servants in the course of their employment, and in the interest and for the benefit of the company, even if fraudulent,[6] *e.g.* for a libel[7] or in breach of duty.[8] A company is not liable for the acts of its agents, though acting with its authority, if the acts be *ultra vires* of the company. Such are void *ab initio* and cannot bind the company. If the agent acts ostensibly on behalf of but without the authority of the company, and the act done is *intra vires* of the company, it will be bound if the other party acted in ignorance of the agent's want of authority, on the principle that persons dealing with the company are not bound to enquire into the regularity of its internal proceedings.[1] If the party dealing with the company have notice of the agent's want of authority the company will not be liable to him, but he may have a claim upon the agent under his warranty of his authority.

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[1] Per Lord Cranworth in *Ranger* v. *Great Western Rly. Co.*, 1854, 5 H.L.C. 72, at p. 86.

[2] See Palmer's Company Law, 12th ed., p. 186 *et seq.*; see Directors, *supra*, para. 222 *et seq.*

[3] *In re Barned's Banking Co.*, 1867, L.R. 3 Ch. 105.

[4] *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439.

[5] *Bank of Ireland* v. *Evan's Trs.*, 1855, 5 H.L.C. 389.

[6] *Barwick* v. *English Joint Stock Bank*, 1867, L.R. 2 Ex. 259; *Lloyd* v. *Grace, Smith & Co.*, [1911] 2 K.B. 489

[7] *Citizens Life Assurance Co.* v. *Brown*, [1904] A.C. 423; *Finburgh* v. *Moss Empires*, 1908 S.C. 928; *Agnew* v. *British Legal Life Assurance Co.*, 1906, 8 F. 422; *Riddell* v. *Glasgow Corporation*, 1910 S.C. 693; 1911 S.C. (H.L.) 35; *British Legal Life Assurance and Loan Co.* v. *Pearl Life Assurance Co.*, 1887, 14 R. 818.

[8] *Royal British Bank* v. *Turquand*, 1856, 6 E. & B. 327.

303. Where an agent of a company has acted without authority the company may ratify the actings of its agent so as to make the actings valid *ab initio*, but not if the actings were *ultra vires* of the company.[2] Similarly a meeting of directors regularly constituted can ratify and confirm what was done by a board meeting irregularly constituted.[3] And a company in general meeting can homologate the actings of directors where their personal interests had conflicted with their duty or disqualified them from acting,[4] even where a special resolution was required.[5] But a company cannot ratify a contract purporting to have been made on its behalf prior to its formation.[6]

(ii) *Contracts.*

(a) *Contracts before Incorporation or Commencement of Business.*

304. A company cannot by adoption or ratification obtain the benefit of or be liable under a contract purporting to have been made on its behalf before it came into existence. Such a contract does not create any contractual relation whatever between the company and the other party to the contract, or impose any obligation whatever on the company towards that party.[7] The person who purports to make the contract on the company's behalf is personally liable on it.[8] Mere acting on or taking the benefit of the contract does not make it binding on the company.[9] Facts may, however, shew that a new contract has been made with the company after its incorporation on the terms of the old contract.[10] It is preferable that the new contract be embodied in a supplementary deed. Where a company formed to take over a business undertakes to pay and discharge the debts and liabilities of the vendors in connection with their business, creditors of the vendors have not ordinarily a right of action against the company for such debts, having no *jus quæsitum*.[1] Also such a company cannot have effectually assigned to it the rights of the vendors in mutual contracts involving *delectus personæ*, and further has itself no title to sue on such contracts, having no contracts with the other parties.[2] Where there is no *delectus personæ* such contracts may be assignable, depending on the intention of the parties.[3]

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[1] *Wright* v. *James Dunlop & Co.*, 1893, 20 R. 363.

[2] *Edinburgh Northern Tramways* v. *Rixon*, 1890, 18 R. 264; 1893, 20 R. (H.L.) 53; *Mason's Trs.* v. *Poole & Robinson*, 1903, 5 F. 789; *Grant* v. *United Kingdom Switchback Rlys. Co.*, 1888, 40 Ch. D. 135.

[3] *Hooper* v. *Kerr, Stuart & Co.*, 1900, 83 L.T. 729.

[4] *Edinburgh Northern Tramways* v. *Rixon*, 1889, 16 R. 653; 1890, 18 R. 264; 1893, 20 R. (H.L.) 53.

[5] *Grant* v. *United Kingdom Switchback Rlys. Co.*, 1888, 40 Ch. D. 135.

[6] *Tinnevelly Sugar Refining Co.* v. *Mirrlees, Watson & Yaryan Co.*, 1894, 21 R. 1009.

[7] *Ibid.*; *North Sydney Investment and Tramway Co.* v. *Higgins*, [1899] A.C. 263; *Natal Land, etc. Co.* v. *Pauline Colliery, etc. Syndicate*, [1904] A.C. 120.

[8] *Kelner* v. *Baxter*, 1866, L.R. 2 C.P. 174.

[9] *In re Northumberland Avenue Hotel Co.*, 1886, 33 Ch. D. 16; *Clinton's Claim*, [1908] 2 Ch. 515.

[10] *Natal Land Co.*, *supra*; *Kelner* v. *Baxter*, *supra*; *James Young & Son*, 1902, 10 S.L.T. 85.

305. Any contract made by a company before the date at which it is entitled to commence business is provisional only, and not binding on the company until that date, and on that date becomes binding (s. 87 (3)). Provisional means that the contract is to be read as if it contained a provision that it shall not be binding on the company unless and until it becomes entitled to commence business.[4] It then becomes complete for what it is worth. The provision applies to a contract to take shares, hence an allottee is not in safety to deal with his shares until the registrar's certificate of the company's right to commence business is issued. If the company never becomes entitled to commence business the contract cannot be enforced.[5] Private companies, companies registered before 1st January 1909, and companies registered before 1st July 1908 which do not issue a prospectus inviting the public to subscribe for shares, are exempt from this provision (s. 87 (6)).

(b) *Form of Contracts—Authentication of Documents.*

306. In Scotland and in England contracts will be valid if made in such a way as to be valid between private persons, and may in the same manner be varied or discharged (s. 76). In Scotland deeds, if so executed, or subscribed on behalf of the company by two of the directors and the secretary, and sealed with the company's seal, are valid whether attested by witnesses or not (s. 76 (3)). It is usual, however, in Scotland, to attest by witnesses the subscriptions of the directors and the secretary. It is sufficient for the valid execution of a contract by a company that it is made by some person acting under the express or implied authority of the company, and, except where the general law requires writing, *e.g.* when it relates to land, a contract may be made orally.

307. One of the effects of registration of a company is that it shall have a common seal (s. 16 (2)). The articles usually provide that its use shall require the authority of a resolution of the board of directors and the presence of two directors and the secretary or other person appointed, who shall sign every instrument to which the seal is affixed. But other provisions may be inserted in the articles. A company transacting business abroad may have an official seal, being a facsimile of the common seal, with the addition of the name of every place where it is to be used, and may authorise someone to use it in a special territory, district, or place abroad (s. 79). Such authority endures for the time mentioned in the instrument conferring the authority, or if no time be mentioned, until notice of revocation or determination of the agent's authority has been given to the person dealing with him (s. 79 (3)). The execution of deeds abroad by an attorney appointed under seal is authorised by the Act (s. 78).

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[1] *Henderson* v. *Stubbs, Ltd.*, 1894, 22 R. 51.

[2] *Grierson, Oldham & Co.* v. *Forbes, Maxwell & Co.*, 1895, 22 R. 812.

[3] *Tolhurst* v. *Associated Portland Cement Manufacturers (1900)*, [1903] A.C. 414; *Asphaltic Limestone Concrete Co.* v. *Glasgow Corporation*, 1907 S.C. 463.

[4] *In re "Otto" Electrical Manufacturing Co. (1905), Ltd.; Jenkins' Claim*, [1906] 2 Ch. 390.

[5] *In re "Otto" Electrical Manufacturing Co., supra; Clinton's Claim*, [1908] 2 Ch. 515.

(c) *Contracts of Companies in General.*

308. A company formed under the Companies Acts can enter into such contracts only as are within the powers of the company as defined by its constitution.[1] The company's consent to decree even will not validate an *ultra vires* contract.[2] The legality of an act by a company, however, may be disputed in Court, and made the fair subject of compromise,[2] but the terms of the compromise must be within the company's powers to effect.[3] Everyone, shareholder or stranger, must be taken to deal with the company with notice of its constitution.[4] But a third party is not fixed with notice of private bye-laws passed by the directors,[5] nor bound to see that every formality prescribed by the articles has been strictly performed. He is entitled to assume that all things have been done regularly if he has no notice of irregularity, and the rule applies both for and against the company.[6]

309. When the seal is affixed fraudulently and without authority to share certificates the company is not bound, even although its secretary has power to deliver share certificates on its behalf. The representation of the seal in such a case is a counterfeit.[7]

310. Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state, *inter alia*, the dates of and parties to every material contract, other than a contract entered into in the ordinary course of business carried on or intended to be carried on by the company or any contract entered into more than two years before the date of issue of the prospectus (s. 81 (1) (*k*)). A contract is material in this connection if its disclosure would be likely to affect the judgment of an intending subscriber for shares.[8] A material contract includes an executed as well as an executory contract. The statutory report issued to the members of a company prior to the statutory meeting of the company must state the particulars of any contract, the modification of which is to be submitted to the meeting for its approval, together with the particulars of the modification or proposed modification (s. 65 (3) (*e*)).

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[1] *Ernest* v. *Nicholls*, 1857, 6 H.L.C. 401.

[2] *Great North-West Central Rly. Co.* v. *Charlebois*, [1897] A.C. 114; *Mason's Trs.* v. *Poole & Robinson*, 1903, 5 F. 789.

[3] *Life Association of Scotland* v. *Caledonian Heritable Security Co.*, 1886, 13 R. 750.

[4] *Royal British Bank* v. *Turquand*, 1856, 6 E. & B. 327; *Marshall* v. *Glamorgan Iron and Coal Co.*, 1868, L.R. 7 Eq. 129, at p. 137.

[5] *In re Asiatic Banking Corporation* (*Royal Bank of India's* case), 1869, L.R. 4 Ch. 252.

[6] *Muirhead* v. *Forth, etc. Mutual Insurance Association*, 1893, 20 R. 442; affd. 21 R. (H.L.) 1; *Heiton* v. *Waverley Hydropathic Co.*, 1877, 4 R. 830; *Browns* v. *Kilsyth Police Commissioners*, 1886, 13 R. 515; *In re County Life Assurance Co.*, 1870, 5 Ch. 288.

[7] *Ruben* v. *Great Fingall Consolidated*, [1906] A.C. 439.

[8] See *Shepheard* v. *Broome*, [1904] A.C. 342.

(d) *Bills and Notes.*

311. If the power to grant negotiable documents is not authorised by its memorandum or articles a company will not be presumed to have such power unless the power is necessarily implied as being inherent in the business it carries on. A trading company has, and other commercial companies may have, implied power to make and accept bills of exchange and promissory notes for the purposes of their business.[1] The test is, in the absence of express power, what is necessary to carry on the business of the company in the ordinary way.[2] Usually the memorandum of association contains express powers. The directors do not require specially to make a resolution before bills or promissory notes are issued.[3] It is only necessary to authorise one of the directors or the secretary or someone else to sign the bill on behalf of the company.

312. A bill of exchange or promissory note is deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority (s. 77). This provision does not of itself give a power to a company to accept bills of exchange or issue negotiable instruments as an incident of its incorporation.[1] If the company has such a power it is sufficient that the document be sealed with the corporate seal.[4] It is a question of construction whether a director or other official by his method of subscription to a bill or promissory note has bound the company or himself only.[5] It is important that the words "for" or "on account of" should be used if the company is to be bound.[6] The name of the company must be stated in legible characters in all bills of exchange, promissory notes, cheques, and indorsements purporting to be signed by or on behalf of the company (s. 63 (1) (*c*)). Heavy penalties are imposed on any director, manager, or officer or any person on behalf of the company, signing or authorising to be signed documents which do not comply with that requirement, and the person so signing or authorising is personally liable to the holder for the amount thereof, unless the same is duly paid by the company (s. 63 (3)). The omission to insert the word "limited" in describing the company, or the use of a wrong name, may have that effect.[1] Where a managing director signed a bill on behalf of a company without authority to do so, the company was held bound to a person taking it in due course.[2]

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[1] *In re Peruvian Railways Co.*, 1867, L.R. 2 Ch. 617, 627.

[2] *In re Cunningham & Co.*, 1887, 36 Ch. D. 532, at p. 538.

[3] *In re Peruvian Railways Co., supra*; *Premier Industrial Bank* v. *Carlton Mfg. Co. and Crabtree, Ltd.*, [1909] 1 K.B. 106.

[4] Bills of Exchange Act, 1882, s. 91.

[5] *E.g. Chapman* v. *Smethurst*, [1909] 1 K.B. 927; *Brebner* v. *Henderson*, 1925 S.C. 643.

[6] *E.g. Dutton* v. *Marsh*, 1871, L.R. 6 Q.B. 361; *Elliott* v. *Bax-Ironside*, [1925] 2 K.B. 301.

(iii) *Notices to and by a Company.*

313. Any document, including a notice to a company, may be served on the company by leaving it at or sending it by post to the registered office of the company (s. 116). The articles of the company usually provide for the manner in which notices by the company to a member are to be given.[3]

(iv) *Arrangements and Compromises.*

See Liquidation.

Subsection (4).—*Liability of Company for Crimes and Offences.*

314. A company can neither prosecute nor be prosecuted for a crime.[4] It cannot be committed for trial,[5] and is not liable to imprisonment.[6] But a company may be prosecuted for contravention of statutory provisions, resulting in fine with the alternative of imprisonment;[7] *e.g.* for an offence under the Sale of Food and Drugs Act, 1875,[8] and generally for any offence of which *mens rea* is not an essential element.[9] It may be guilty of and be fined for contempt of Court.[10]

Subsection (5).—*Power to Sue and Defend.*

315. A company has power under the Act of 1908 to do whatever it is necessary to do with a view to the attainment of the objects stated in its memorandum, and also whatever may fairly be regarded as incidental to and consequential on the stated objects.[11] Accordingly a company has, for the purpose of carrying out its objects, power to bring actions and to take proceedings, and to refer to arbitration (s. 119). The authority to do so may be proved *prout de jure*,[12] and is usually expressly conferred on the directors in the articles of association, and covers the power to refer to arbitration in judicial proceedings.[1]

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[1] *E.g. Penrose* v. *Martyr*, 1858, E. B. & E. 499; *Nassau Steam Press* v. *Tyler*, 1894, 70 L.T. 376; *Chapman* v. *Smethurst*, *supra*; *Dermatine Co.* v. *Ashworth*, 1905, 21 T.L.R. 510.

[2] *Dey* v. *Pullinger Engineering Co.*, [1921] 1 K.B. 77.

[3] Table A, Arts. 110 to 114; and see Buckley on the Companies Acts, 10th ed., for a commentary on these articles.

[4] Macdonald's Criminal Law, p. 281; *Miles* v. *Finlay & Co.*, 1830, 9 S. 18; but see *Great North of Scotland Rly. Co.* v. *Anderson*, 1897, 25 R. (J.) 14.

[5] *R.* v. *Daily Mirror Newspapers, Ltd.*, [1922] 2 K.B. 530.

[6] *Fletcher* v. *Eglinton Chemical Co.*, 1886, 14 R. (J.) 9.

[7] *Fletcher* v. *Eglinton Chemical Co.*, *supra*; *Robert M'Alpine & Sons* v. *Ronaldson*, 1903, 3 F. (J.) 82; Interpretation Act, 1889, s. 2.

[8] *Pearks, Gunston & Tee, Ltd.* v. *Ward*, [1902] 2 K.B. 1.

[9] *Mousell Bros.* v. *London and North-Western Rly. Co.*, [1917] 2 K.B. 836, 844, 846.

[10] *R.* v. *Hammond & Co.*, [1914] 2 K.B. 866.

[11] See Palmer's Company Law, p. 60; *Attorney-General* v. *Great Eastern Rly. Co.*, 1880, 5 App. Cas. 473.

[12] See *Zelma Gold Mining Co.* v. *Hoskins*, [1895] A.C. 100.

316. Where there is a corporate body capable of holding property and sustaining the relations of debtor and creditor, the corporate body is the proper party to sue and be sued in all matters relating to such property and relations. A company incorporated under the Companies Acts accordingly sues in its registered name and address, and must set forth on record its title to sue in each case.[2] The only exceptions are where directors or the majority of the members have obtained control of the company and are using their power for purposes *ultra vires*[3] or improper, *e.g.* committing a fraud upon the minority;[4] acting upon a special resolution of the company obtained by a trick;[5] acting upon an ordinary resolution of the company inconsistent with the articles.[6] In such cases, or in others where the claims of justice require it,[7] the minority may sue by a single member or shareholder on behalf of himself or of himself and others. In these cases the minority can commence proceedings in name of the company.[8] In other cases, where the acts of directors are capable of confirmation by the majority of the members, the Court will not interfere;[9] and only the majority has a title to sue, and must do so in the name of the company.[10] Where, however, the delay necessitated in ascertaining the opinion of the company would entail a denial of justice, individual members may use the name of the company to raise an action and do diligence. But they do so *periculo petentis*, and if they do so improperly the action may be dismissed and they may be ordered to pay the company's expenses as between agent and client and the defender's expenses as between party and party.[11] A limited company has no title to sue in respect of a contract entered into on its behalf before it came into existence.[12]

317. A company has power voluntarily to refer to arbitration existing or future differences between itself and any other company or person, and in this matter the provisions of the Railway Companies Arbitration Act, 1859, apply (s. 119). It has also power, under sanction of the Court, to compromise with members or creditors (s. 120).

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[1] *Zelma Gold Mining Co.* v. *Hoskins, supra.*

[2] *Magistrates of Kilmarnock* v. *Mather*, 1867, 7 M. 548.

[3] *Burland* v. *Earle*, [1902] A.C. 83; *Gill* v. *Arizona Copper Co.*, 1900, 2 F. 843; *Edinburgh Northern Tramways Co.* v. *Mann*, 1891, 18 R. 1140; 1892, 20 R. (H.L.) 7; *Smyth* v. *Muir*, 1891, 19 R. 81, per Lord Kinnear; *Balfour's Trs.* v. *Edinburgh and Northern Rly. Co.*, 1848, 10 D. 1240; *Smith* v. *Glasgow and South-Western Rly.*, 1897, 4 S.L.T. 327.

[4] *Ibid.*; *Cook* v. *Deeks*, [1916] 1 A.C. 554; *Brown* v. *Stewart*, 1898, 1 F. 316; *Hannay* v. *Muir*, 1898, 1 F. 306.

[5] *Baillie* v. *Oriental Telephone Co.*, [1915] 1 Ch. 503.

[6] *Quin & Axtens* v. *Salmon*, [1909] 1 Ch. 311; [1909] A.C. 442.

[7] *Russell* v. *Wakefield Waterworks Co.*, 1875, L.R. 20 Eq. 474, per Jessel M.R.

[8] See Palmer's Company Law, (12th ed.), p. 257 *et seq.*

[9] *Foss* v. *Harbottle*, 1843, 2 Hare 461; *MacDougall* v. *Gardiner*, 1875, 1 Ch. D. 13; *Lee* v. *Crawford*, 1890, 17 R. 1094.

[10] *Orr* v. *Glasgow, Airdrie, and Monklands, etc. Rly. Co.*, 1857, 20 D. 327; affd. 1860, 3 Macq. 799; *Fraser* v. *City of Glasgow Bank*, 1879, 6 R. 1259; *Lee* v. *Crawford, supra*; *Brown* v. *Stewart*, 1898, 1 F. 316; *Young* v. *Brownlee & Co., Ltd.*, 1911 S.C. 677; *Foss* v. *Harbottle, supra.*

[11] *La Compagnie de Mayville* v. *Whitley*, [1896] 1 Ch. 788.

[12] *Tinnevelly Sugar Refining Co.* v. *Mirrlees, Watson & Yaryan Co.*, 1894, 21 R. 1009; *James Young & Sons, Ltd.* v. *Gowans*, 1902, 10 S.L.T. 85.

318. A liquidator must sue in the name of the company. He has no title to sue in his own name.[1] Where the company is being wound up by the Court he requires the sanction of the Court to sue or defend an action in name of the company (s. 151 (*a*)); and when a winding-up order has been made, no action or proceeding may be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.[2] But if a case is at avizandum when the winding-up order is pronounced, judgment may be pronounced without sisting the liquidator.[3] A company, on the registration of its memorandum, may be cited by leaving a writ at, or sending it by post to, the registered office of the company.[4]

319. When a limited company is pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appear by credible testimony that there is reason to believe that the company will be liable to pay the costs of the defender if successful, require sufficient security for costs to be given, and may stay all proceedings until the security is given (s. 278).[5] Credible testimony may be found in the state of the pleadings for the company in conjunction with its refusal to give the judge satisfactory information in regard to its financial position.[6] A company defending and reclaiming does not come under this rule,[7] nor if it defends a judgment in its favour after going into liquidation.[8] To be required to find caution, it must be truly as well as nominally *in petitorio*.[9]

320. Where a company is registered in pursuance of Part VII. of the Act and any actions are pending by or against the company, these may be continued as if registration had not taken place; but if the property and effects of the company are insufficient to satisfy decree against the company, an order may be obtained for winding up the company.[10]

SECTION 13.—OWNERSHIP AND DISPOSITION OF PROPERTY.

321. On incorporation under the Companies Act, 1908, a company is "capable forthwith of exercising all the functions of an incorporated company, with power to hold lands" (ss. 16, 263), and this applies to companies formed under former Companies Acts (s. 245), and also to companies registered but not formed under such Acts (s. 246). Companies formed for the purpose of promoting art, science, religion, charity or any other like object, not involving the acquisition of gain by the company or by its individual members, may not, without the licence of the Board of Trade, hold more than two acres of land; but the Board may by licence empower any such company to hold land in such quantity, and subject to such conditions, as the Board think fit.[1] The only limitation on the power of a company to hold personal property is that it may not own its own shares,[2] except shares forfeited or legitimately surrendered under power in the articles of association and held with a view to resale or cancellation.[3] As a matter of specific enactment, a company may have power to hold for re-issue redeemed debentures in certain cases.[4]

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[1] *Munro* v. *Hutchison*, 1896, 3 S.L.T. 268.

[2] Sec. 142; and see ss. 140, 262, 265, 266, 270, 271.

[3] *Parker & Co. (Sandbank), Ltd.* v. *The Western Assurance Co.*, 1925, S.L.T. 131.

[4] Sec. 116; Citation Amendment (Scotland) Act, 1882; Interpretation Act, 1889, s. 26.

[5] *E.g. New Mining and Exploring Syndicate* v. *Chalmers & Hunter*, 1909 S.C. 1390; *Brownrigg Coal Co.* v. *Sneddon*, 1911 S.C. 1064; *Southern Bowling Club* v. *Edinburgh "Evening News,"* 1901, 9 S.L.T. 35; *Edinburgh Entertainments, Ltd.* v. *Stevenson*, 1925 S.C. 848.

[6] *New Mining and Exploring Syndicate* v. *Chalmers & Hunter, supra;* see also *Edinburgh Entertainments, Ltd.* v. *Stevenson, supra.*

[7] *Sinclair* v. *Glasgow and London Contract Corporation*, 1904, 6 F. 818.

[8] *Star Fire and Burglary Insurance Co.* v. *Davidson & Sons*, 1902, 4 F. 997.

[9] *English's Coasting and Shipping Co.* v. *British Finance Co.*, 1886, 13 R. 430.

[10] Sec. 262; see Wilton's Company Law and Practice, p. 401.

322. A company has, as incidental to its management, large powers of sale, but a power to sell its business is not implied, and it is doubtful whether an express power contained in the memorandum is valid for the purpose of the distribution of the proceeds among the members where a sale is made in disregard of the rights of dissentient members and liquidation is in contemplation.[5] As to the effect of liquidation on power to dispose of property of the company, see LIQUIDATION.

SECTION 14.—BORROWING.

SUBSECTION (1).—*Power to Borrow.*

323. Power to borrow is not inherent in all companies, but may be implied, or found expressly or inferentially in the constitution of the company.[6] An implied power to borrow arises whenever the objects of the company are such that a power to borrow may fairly be regarded as incidental to the company's objects.[7] Ordinary trading companies whose regulations are silent on the subject of borrowing have an implied power to borrow for the purposes of the business.[8] But this implied power may be expressly limited.[9]

324. If a company, being without power to borrow, or having a limit to borrowing assigned in its memorandum, borrows outwith its power, the act is *ultra vires* of the company, even if it be a trading company, and in either case the loan is null and cannot be ratified. But in England, and, it is thought, in Scotland also,[1] although the lender in an *ultra vires* borrowing has no action against the company,[2] he has a right to follow his money in the hands of the company before it is spent and to have the company interdicted from parting with it, or he may prove beneficial application of the loan to the company's purposes, *e.g.* that it has been spent in paying off just debts of the company, when he may be entitled to stand in place of and be subrogated to the rights of the creditors so paid; [3] or he may trace the money in the hands of the recipient.[4] He is not entitled to any preference which the creditor may have held.[5] It is immaterial whether the lender did or did not know that the borrowing was *ultra vires* of the company.[6] Where the company's account is not overdrawn, a banker is bound to honour its cheques, but takes the risk of the company not having the power if he allows an overdraft.[7] If power to borrow existed he is unaffected though the money be applied *ultra vires.*[8] A lender may have a right of action against the directors for breach of their implied warranty of authority.[9]

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[1] Sec. 19; for form of licence see Third Schedule, Form F.

[2] *Trevor* v. *Whitworth*, 1887, 12 App. Cas. 409.

[3] See Table A, Art. 27; and see *supra*, s. 10, subsecs. (5) and (6).

[4] Sec. 104; and see *infra*, s. 14, subsec. (3) (*a*).

[5] See s. 192; *Bisgood* v. *Henderson's Transvaal Estates*, [1908] 1 Ch. 743; *Etheridge* v. *Central Uruguay, etc. Rly.*, [1913] 1 Ch. 425; see Palmer's Company Law, pp. 66 and 456, and para. 296, *supra*.

[6] Palmer's Company Law, p. 286; *Baroness Wenlock* v. *River Dee Co.*, 1885, 10 App. Cas. 354.

[7] Palmer's Company Law, p. 286.

[8] *General Auction Estate Co.* v. *Smith*, [1891] 3 Ch. 432; cf. *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society*, 1884, 9 App. Cas. 857.

[9] See Table A, Art. 73.

A limit to borrowing imposed in the memorandum may be altered or removed by special resolution confirmed by the Court.[10] But the change applies to future loans, and prior ones cannot in this manner be ratified. If the limit be in the articles it may be altered or removed by a special resolution (s. 13).

325. Where the company has by its constitution power to borrow and the general powers of the company are vested in the directors (Table A, Art. 71), they require no express authority to exercise the power.[11] But if the directors are limited in their exercise of the power, and exceed the power allowed them, the borrowing, being *ultra vires* of the directors, is irregular, and the lender may have no right of action against the company itself in respect of the loan. The company, however, may be barred from founding upon the irregularity, where *ex facie* of the borrowing it is regular and in accordance with the provisions of the Act and the constituting documents, and the lender has in fact no notice of the irregularity.[12] Further, the company may ratify the transaction, as it may do if the borrowing be within, and to the extent it is within, the powers of the company.[1] The managers of a company, appointed by directors of the company having the widest powers, cannot borrow so as to bind the company without express power. Such a power cannot be implied.[2]

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[1] See Gloag on Contract, p. 147 *et seq.*

[2] *Cunliffe Brooks & Co.* v. *Blackburn, etc. Building Society*, 22 Ch. D. 61; 9 App. Cas. 857.

[3] Palmer's Company Law, p. 292; *In re Wrexham, etc. Rly. Co.*, [1899] 1 Ch. 440; *Cunliffe Brooks & Co.* v. *Blackburn, etc. Building Society, supra*; *Sinclair* v. *Brougham*, [1914] A.C. 398.

[4] *Sinclair* v. *Brougham, supra.*

[5] *In re Wrexham, etc. Rly. Co., supra.*

[6] *Reversion Fund and Insurance Co.* v. *Maison Cosway*, [1913] 1 K.B. 369.

[7] *Cunliffe Brooks & Co.* v. *Blackburn, etc. Building Society, supra.*

[8] *Paterson's Trs.* v. *Caledonian Heritable Security Co.*, 13 R. 369.

[9] *Firbank's Exrs.* v. *Humphreys*, 1886, 18 Q.B.D. 54; *Chapleo* v. *Brunswick Permanent Building Society*, 1887, 6 Q.B.D. 696.

[10] Sec. 9; *In re Reversionary Interest Society, Ltd.*, [1892] 1 Ch. 615.

[11] *In re Patent File Co.*, 1870, L.R. 6 Ch. 83.

[12] *Royal British Bank* v. *Turquand*, 1856, 6 E. & B. 327; *Irvine* v. *Union Bank of Australia*, 1877, 2 App. Cas. 366.

SUBSECTION (2).—*Power to Grant Security for Money Borrowed.*

326. A company having power to borrow may do so in any manner it finds most convenient, as by bills, debentures, debenture stock, and overdrafts,[3] and may, as incidental to the power to borrow, grant security over the company's property and rights,[4] including uncalled capital. The power to grant the security instruments is usually contained in the memorandum and articles.

327. If there is power in the memorandum, or power in the articles and nothing in the memorandum to the contrary, a company may borrow on the security of uncalled capital.[5] The power need not be contained in the articles. But the omission to authorise such a charge in the memorandum may imply a prohibition, and in this connection borrowing powers have been construed somewhat strictly.[6] A power in the memorandum to mortgage the property and rights of the company, or other apt and proper words, or a sufficient context,[7] is sufficient.[8] But "property" has been held not to cover uncalled capital as being property of the company only potentially.[9] In the absence of special power the mortgage of future calls is invalid, as being an encroachment on the discretion of the directors in the future administration of the company.[10] Practically the only way in which a security can be created in Scotland over uncalled capital, as being moveable estate, is to assign the uncalled capital to a named person and intimate the assignation personally to every shareholder,[11] and the articles of association would require to contain the necessary machinery for making the right effectual, *i.e.* enabling the lender to put himself as at the date of the assignation in the place of the company, that is, in a position to call up the capital.[1] Calls in arrear, being debts due to the company, may be the subject of security by assignment or arrestment, as also may calls made but not yet payable, and, in England, calls determined on but not yet made.[2] It has been held in England that a company possessing a reserve capital not capable of being called up except for winding-up purposes (ss. 58 and 59) may not mortgage such reserve capital.[3]

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[1] *Irvine* v. *Union Bank of Australia, supra.*

[2] *Ross, Skolfield & Co.* v. *State Line Steamship Co.*, 1875, 3 R. 134.

[3] *Cunliffe Brooks & Co.* v. *Blackburn, etc. Benefit Building Society*, 1884, 9 App. Cas. at p. 865.

[4] *Paterson's Trs.* v. *Caledonian Heritable Security Co.*, 1886, 13 R. 369; *In re Patent File Co.*, 1870, L.R. 6 Ch. 83.

[5] *Newton* v. *The Debenture Holders of Anglo-Australian, etc. Co.*, [1895] A.C. 244; *In re Pyle Works*, 1890, 44 Ch. D. 534; *Ballachulish Slate Quarries* v. *Menzies*, 1908, 45 S.L.R. 667.

[6] *Newton, supra.*

[7] *Bank of South Australia* v. *Abrahams*, 1875, L.R. 6 P.C. 265.

[8] *Howard* v. *Patent Ivory Manufacturing Co.*, 1888. 38 Ch. D. 156; *Page* v. *International Agency, etc. Trust*, 1893, 68 L.T. 435 ("assets"); *Jackson* v. *Rainford Coal Co.*, [1896] 2 Ch. 340; *Newton* v. *The Debenture Holders of Anglo-Australian, etc. Co., supra.*

[9] *In re Streatham and General Estates Co.*, [1897] 1 Ch. 15; *In re Russian Spratts, Ltd.*, 1898, 78 L.T. 480.

[10] *In re Sankey Brook Coal Co.*, 1870, L.R. 9 Eq. 721.

[11] Per Lord Pres. Dunedin in *The Ballachulish Slate Quarries* v. *Menzies*, 1908, 45 S.L.R. 667; *Do* v. *Malcolm*, 1908, 15 S.L.T. 963; *Do* v. *Black*, 1908, 16 S.L.T. 183.

328. A security by way of floating charge over the assets of a company is ineffectual by the law of Scotland.[4] But a floating charge or security over the undertaking, or over the assets in England or Ireland, is valid in the case of companies registered in these countries (s. 93). If the company be registered in England but the property situated in Scotland, the *lex loci rei sitæ* would, according to the recognised principles of international law, prevail, and the security would not be effectual unless completed according to the law of Scotland.[5] The same principles ought, it is thought, to apply whether the security is perfected by assignment and intimation, or by diligence.[6] In England it appears to be recognised that where an English company executes a floating charge over its assets situated in countries such as Scotland where a floating charge is not *per se* valid, other creditors may, by diligence, attach specific assets notwithstanding the charge,[7] and could similarly, no doubt, intimate and thereby complete an assignment of a specific asset. But if, when liquidation supervenes, nothing has been done to perfect the security according to the *lex loci*, it will then be a question for the Court of the liquidation to decide whether the floating charge creditors (the debenture holders), or the general creditors, will be entitled to claim the assets charged, *i.e.* whether the receiver for the debenture holders or the liquidator is entitled thereto. If the company be registered in Scotland, but the property situated in England, it is thought that similarly the *lex loci rei sitæ* would prevail and a floating charge, which is recognised by the law of England, would be effectual.

329. When security is given, it is generally effected by a conveyance in appropriate form to trustees of the subject of security, to hold, and, when necessary, to administer and realise. If the subject conveyed be heritage or long leases, registration in the Sasines Register is required to complete the security; if obligations, intimation is necessary; if uncalled capital, intimation to the shareholders; if ordinary leases, possession must follow; if moveables, delivery must be got; and if ships, there must be registration in the Shipping Register.

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[1] *The Ballachulish Slate Quarries Co.* v. *Menzies*, 1908, 45 S.L.R. 667, per Lord M'Laren at p. 669.

[2] *In re Sankey Brook Coal Co.*, 1870, 9 Eq. 721.

[3] Lindley L.J. in *In re Pyle Works*, 1890, 44 Ch. D. 534, at p. 586; *In re Mayfair Property Co.*, [1898] 2 Ch. 28; but see Palmer's Company Law, p. 288 *et seq.*

[4] *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017; and see *The Ballachulish Slate Quarries Co.* v. *Menzies*, *supra.*

[5] *In re Queensland Mercantile and Agency Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. 219; *In re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713.

[6] *Donaldson* v. *Ord*, 1855, 17 D. 1053, 1061; *Salt Mines Syndicate*, 1895 2, S.L.T., 489; but see *Scottish Provident Institution* v. *Cohen*, 1888, 16 R. 113, questioned by Prof. Galbraith Miller in Juridical Review, 1891, iii. 40.

[7] *Maudslay* v. *Maudslay, Sons & Field*, [1900] 1 Ch. 602; *Liverpool Marine Credit Co.* v. *Hunter*, 1868, L.R. 3 Ch. 479; Palmer's Company Law, p. 290.

SUBSECTION (3).—*Debentures and Debenture Stock.*

(i) *Form and Contents of Instruments of Security.*

(a) *Debentures.*

330. The term "debenture" is a very wide term, but is now generally used to signify a security for money, called on the face of it a debenture, and providing for the payment of a specified sum at a fixed date with interest meantime half-yearly.[1] Its principal characteristic is an acknowledgment of indebtedness.[2] It may be framed as a perpetual debenture, when the principal moneys thereby secured become payable only in certain events, *e.g.* on notice by the company of intention to pay off, default in payment of interest, or winding up. Such debentures were formerly thought to be *ultra vires* where the company had only power to borrow and no specific power to raise money.[3] The Act legalises irredeemable debentures and debenture stock whether issued or executed before or after the passing of the Act (s. 103). Debentures are generally issued in blocks, each separate debenture bearing to be one of a series, all repayable at the same date, and ranking *pari passu inter se.* If not payable at the same date, they will be payable as they fall due, and those of shorter date will have a preference. But there generally is a provision that failure to meet any debenture of the series when due will accelerate liability on all. And if liquidation supervenes, present and future debts will be ranked as in bankruptcy (s. 208).

331. Debentures may be made payable to a person named, his heirs, executors, or assignees, or to a person named or to his order, or to a person named or other the registered holder, or to a person named or bearer, or simply to bearer. Debentures to bearer, whether home or foreign, are negotiable instruments by the law merchant, and pass by delivery free from the equities between the original parties.[4] Notwithstanding the Scots Act, 1696, c. 25 (which declares null deeds subscribed blank in the person's name in whose favour they are conceived), debentures to bearer issued in Scotland are valid and binding according to their terms (s. 106). Debentures to bearer, which purport to be negotiable, will, in the hands of a holder *bona fide* and for value, be supported also on the ground of bar or estoppel.[1]

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[1] See Palmer's Company Law, p. 301.

[2] *Lemon* v. *Austin Friars Investment Trust*, [1926] 1 Ch. 1.

[3] Buckley J. in *In re Southern Brazilian Rio Grande do Sul Rly. Co.*, [1905] 2 Ch. 78.

[4] *Goodwin* v. *Robarts*, 1875, L.R. 10 Ex. 76 and 337; 1 App. Cas. 476; *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch. 270; [1892] A.C. 201; *Venables* v. *Baring Bros. & Co.*, [1892] 3 Ch. 527; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120; *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q.B. 658; *Edelstein* v. *Schuler & Co.*, [1902] 2 K.B. 144.

332. A debenture may or may not be secured. When security is given, it is generally effected by a conveyance in appropriate form of the subject of security to trustees, to hold and, when necessary, to administer and realise. In the trust deed for debenture holders it is generally provided that, notwithstanding the conveyance of the security subjects to trustees, the company shall continue in the management of its business and property, but may be superseded on the occurrence of certain events, when the security shall become enforceable; *e.g.* the failure of the company to pay interest or principal within a certain time, a winding-up resolution or order, or the breach of any of the covenants or conditions of the trust deed. Thereupon the trustees are authorised to enter into possession of the premises, and also of the stock and other moveable property thereon, with power to sell and dispose thereof, or to carry on the business. If possession of the moveables be not obtained, the preferable security will to that extent be defeated; the right of the trustee to get, and the obligation of the company to give, possession is simply a personal obligation ranking with others when a liquidation supervenes.[2] Unless the trust deed can be brought under one or other of the exceptions to the Act 1696, c. 5, even though possession be obtained under the deed, yet, if a winding-up or supervision order be pronounced within sixty days after, questions may arise as to the debenture-holders' preference. It is to be observed that though a public company cannot be sequestrated.[3] it may be made notour bankrupt under the Statute 1696, c. 5, to the effect of equalising diligence and enabling creditors to reduce preferences struck at by that statute.[4]

333. Unless the articles or the conditions of issue of a debenture expressly otherwise provide, or unless the debentures have been redeemed in pursuance of any obligation on the company so to do (not being an obligation enforceable only by the person to whom the redeemable debentures were issued or his assigns) a company has power to keep the debentures alive for the purposes of reissue (s. 104 (1)). The Act of 1908, in so providing, made the provision retrospective (*ibid.*). Formerly such reissues were ineffective to keep alive debentures,[5] repayment to the company exhausting the security deed,[6] and they could not rank *pari passu* with other debentures of the same issue not redeemed by the company. The persons entitled to the debentures so reissued have the same rights and priorities as if the debentures had not previously been issued (s. 104 (1)). Priority is thus preserved as of the date of the original issue and not of the reissue.[1] The law is in an anomalous state, because a lender to the company whose security is postponed to an issue of debentures protected by the provisions of this section may not be safe on account of the latent prior security lurking in any redeemed debenture not reissued prior to his loan.[2] Reissue may be effected (1) by reissuing the same debentures; (2) by issuing others in their place; (3) by transfer to a nominee of the company and a transfer from the nominee (s. 104). Where debentures have been deposited by the company to secure advances from time to time on current account or otherwise, the fact of the account of the company having ceased to be in debit does not itself involve the redemption of the debentures (s. 104 (3)). The reissue of debentures is not to be treated as the issue of new debentures for the purposes of any provision limiting the amount or number of debentures to be issued (s. 104 (4)).

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[1] See Lord Cairns' judgment in *Goodwin* v. *Roberts*, *supra*, at 1 App. Cas. 490.

[2] *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017.

[3] *Standard Property Investment Co.* v. *Dunblane Hydropathic Co.*, 1884, 12 R. 328.

[4] *Clark* v. *Hinde, Milne & Co.*, 1884, 12 R. 347, per Lord Shand at p. 353; see *Athole Hydropathic Co.* v. *Scottish Provincial Assurance Co.*, 1886, 13 R. 818; s. 213.

[5] Buckley J. in *In re George Routledge & Sons*, [1904] 2 Ch. 474.

[6] Bell, Prin., s. 1459.

334. A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance (s. 105). Prior to the Act of 1907 (s. 16) this was not the law of England.[3] This provision of the Act does not apply in Scotland to such contracts between companies and lenders to them, because where such contracts are enforceable in Scotland the Scottish Courts, administering Scots law, have discretion to decree implement, and failing that remedy would award damages for breach of contract.[4] Similarly a person who has so contracted may compel the company to issue to him debentures on the stipulated terms.

(b) *Debenture Stock.*

335. Debenture stock is a loan by a multitude of lenders, whose title consists of a certificate by the company that they hold certain portions thereof under provisions as to periodical payment of interest and repayment of principal. The interests of the holders are entrusted to trustees, who generally hold subjects conveyed in security by the company, and are empowered and directed, on default in payment of interest, or on a supervening liquidation, to enter into possession, administer the property, carry on the business, and realise the estate for the benefit of the stockholders.

Debenture stock may be payable or redeemable at a specified date, or on the expiry of a certain number of years, or on the expiry of a specified notice in writing, which may follow upon stipulated drawings, or in the event of interest being for a specified time in arrear, or in the event of a winding-up. If no period be stipulated, the debenture being styled "perpetual," the loan will be payable on liquidation, or, if the trustees have taken possession, in the due course of their administration (see s. 103).

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[1] Barton J. in *Fitzgerald* v. *Persse*, [1908] 1 I.R. 279.

[2] Wilton's Company Law and Practice, p. 201; and see Palmer's Company Law, p. 338; Buckley on the Companies Acts, 10th ed., p. 262 *et seq.*

[3] *South African Territories* v. *Wallington*, [1898] A.C. 309.

[4] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 1.

Debenture stock is transferable and a register is kept by the company (s. 102).

(c) *Debenture Trust Deeds.*

336. Trust deeds for debenture holders and debenture stockholders contain numerous executory provisions, including powers to the holders to convene meetings and give instructions, within certain limits, to the trustees. Powers are also sometimes given to modify the right of holders, a majority binding the minority;[1] and under a compromise or arrangement between the company and its creditors they may be deprived of their security by the vote of the requisite majority, if sanctioned by the Court (s. 120).[2] There is also generally a very ample clause of indemnity in favour of the trustees, but, subject thereto, they are liable for loss arising from breach or neglect of duty or malversation in office.[3] Acts *ultra vires* of the trustees may be reduced in a question with third parties.[4]

(ii) *Stamp Duty.*

337. Under the Stamp Act of 1891 the stamp duty on each debenture is at the rate of 2s. 6d. per £100.[5] The stamp on debenture stock is paid on the whole issue at once at the same rate, and is impressed on the deed, or, if more than one, the principal deed creating the stock, the other or subsidiary deed bearing a deed stamp. When afterwards additional security is given, or security substituted, a stamp duty at the rate of 6d. per £100, but not exceeding 10s., is chargeable.[6] Certificates of debenture stock which has paid the above mortgage stamp require no stamp.

Debentures payable to bearer are marketable securities.[7] By the Finance (1909-10) Act, 1910 (s. 76), the stamp duty on marketable securities is increased to 5s.

Interest coupons on debenture bonds are exempt from stamp duty if attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of the time for its payment.[8]

The stamp duty on transfer of a debenture (except a marketable security) is 6d. for every £100.[9]

338. By the Finance Act, 1899 (s. 8), where a company established in the United Kingdom proposes to issue any loan capital, it must, before the issue, deliver to the Inland Revenue Commissioners a statement of the amount proposed to be secured by the issue, such statement being charged with an *ad valorem* duty of 2s. 6d. per £100; but the duty is not to be charged to the extent to which it is shewn, to the satisfaction of the Commissioners, that the stamp duty payable in respect of a mortgage or marketable security has been paid on any trust deed or other document securing the loan.

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[1] See, as to restrictions on this power, *British America Metal Corporation* v. *O'Brien*, [1927] A.C. 369.

[2] *Gillies* v. *Dawson*, 1893, 20 R. 1119.

[3] *E.g. Wilson* v. *Guthrie, Smith, and Ors.*, 1894, 2 S.L.T. No. 347.

[4] *Kidd* v. *Paton's Trs.*, 1912, 2 S.L.T. 363.

[5] Schedule, *voce* Mortgage, etc. (1).

[6] *Ibid.*, (2); Revenue Act, 1903, s. 7.

[7] Stamp Act, 1891, s. 122; see *Texas Land and Cattle Co.* v. *Inland Revenue*, 1888, 16 R. 69.

[8] Stamp Act, 1891, s. 31, superseding *Australasian Mortgage and Agency Co.* v. *Inland Revenue*, 1888, 16 R. 64. Alpe on the Law of Stamp Duties, 18th ed., p. 73 *et seq.*

[9] Stamp Act, 1891, Schedule, *voce* Mortgage (4).

339. The reissue of a debenture, or the issue of another debenture in its place, is treated as the issue of a new debenture for the purposes of stamp duty (s. 104). Any person lending money on the security of a debenture reissued which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice, or, but for his negligence, might have discovered, that the debenture was not duly stamped, the company being in such case liable to pay the proper stamp duty and penalty (s. 104).

(iii) *Debenture Prospectus.*

340. The issue of debentures and debenture stock is covered by the provisions regarding prospectuses in the Act of 1908 (ss. 80–84, and in particular s. 84). Apart from that enactment, a promoter is liable in damages at common law for false and fraudulent representations which induce persons to take debentures or debenture stock in a company.[1]

In determining the construction of the terms of a debenture, the prospectus, upon the basis of which the debenture was issued, cannot be regarded.[2]

SUBSECTION (4).—*Registration of Mortgages and Charges.*

341. The Act (s. 100) requires the company to keep a register of mortgages and charges specifically affecting property of the company, with a view to enabling creditors readily to see the particulars of effectual securities in ordinary form which the company may have granted from time to time,[3] but the section does not authorise by implication the granting of mortgages or debentures over the whole undertaking of the company or over its moveable property *retenta possessione*.[4] Charge has a wider meaning than mortgage, and would cover an arrestment.[5] This provision of the Act is directory only, and a mortgage is, in consequence, not rendered void by the omission to register it in the company's register of mortgages. The provision is, however, fortified by the imposition of a fine or penalty upon any director, manager, or other officer of the company knowingly and wilfully authorising or permitting the omission of any entry. Where such persons are themselves the mortgagees they are not barred from claiming under a charge not so registered.[1] But the opinion has been stated [2] that concealment by a director from an intending creditor through non-registration of the director's security would be a fraud, and upon that principle directors might lose the benefit of their security.

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[1] *Dunnett* v. *Mitchell*, 1885, 12 R. 400.

[2] *In re Tewkesbury Gas Co.*, [1911] 2 Ch. 279.

[3] *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017, per Lord Shand at p. 1034.

[4] *Ibid.*; and *Salt Mines Syndicate, Ltd.*, 1895, 2 S.L.T. 489.

[5] See *Emanuel* v. *Bridger*, 1874, L.R. 9 Q.B. 286.

342. The company's register of mortgages must be kept open at all reasonable times to the inspection of any creditor or member without fee, and of any other person on payment of such fee, not exceeding one shilling, as the company may prescribe. Any director or manager knowingly and wilfully permitting the refusal of inspection is liable to a penalty not exceeding five pounds and a further fine of two pounds per day for continued refusal (s. 101). Similar provisions apply to debentures and trust deeds for debenture holders (s. 102).

343. The Act (s. 93) provides for the registration with the Registrar of Companies by companies registered in England or Ireland of mortgages and charges. So far as any security on the company's property or undertaking is thereby conferred, mortgages and charges are void against the liquidator and creditors of the company unless the prescribed particulars of the mortgage or charge, together with the creating instrument, are registered within twenty-one days after the date of its creation, and on their so becoming void the money secured thereby immediately becomes payable (s. 93). The necessary particulars of a bond granted by an English or Irish company over heritable property in Scotland must accordingly be duly filed with, and the bond exhibited to, the Registrar of Companies in England or Ireland, and the registrar's certificate obtained.[3] This duty primarily lies upon the company, but the creditor in the security may see to this at the expense of the company (s. 93 (7)). If by neglect to secure compliance with this provision the security for the charge be lost, the claim of the creditor thereunder will be reduced to a general ranking notwithstanding that the security may *quoad* title be validly constituted by the law of Scotland.[4] An extension of time for rectification of the register may be applied for (s. 96). The *punctum temporis* in the creation of a charge has been held in effect to be the execution of the deed.[5]

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[1] *Wright* v. *Horton*, 1887, 12 App. Cas. 371.

[2] Per Jessel M.R. in *In re Globe New Patent Iron Co.*, 1879, 48 L.J. Ch. 293; and see Lord Watson in *Wright* v. *Horton*, *supra*.

[3] See Practice and Procedure of the Registrar of Companies, p. 54.

[4] Wilton's Company Law and Practice in Scotland, p. 188.

[5] Joyce J. in *In re Spiral Globe Co.*, [1902] 2 Ch. 209.

COMPANIES CLAUSES ACTS.

See PUBLIC COMPANY.

COMPANY (WINDING UP).

See LIQUIDATION.

COMPENSATION.

TABLE OF CONTENTS.

	PAGE
Introduction	151
Definition	151
Method of Effecting Compensation	152
Recompensation	153
Secured Debts	153
Compensable Debts in General	154
Must be Acquired *Bona Fide*	154
Must be of the Same Kind	154
Must Both be Liquid	154
Must Both be Presently Exigible	155
Compensable Debts in Bankruptcy	156
Application of General Rules	156
No Concourse after Sequestration	156
Balancing Accounts in Bankruptcy	157
Valuation of Future and Contingent Debts	159
Persons between whom Compensation is Competent	160
Statutory Bar of the Plea	166

SECTION 1.—INTRODUCTION.

SUBSECTION (1).—*Definition.*

344. Compensation is the term applied in Scots law to the process, in English law termed "set off," by which a debt arising out of one obligation is used to cancel or *pro tanto* diminish a debt arising out of another obligation, where a *concursus debiti et crediti* has occurred in respect that the creditor in each obligation is respectively the debtor in the other. By a concourse of debit and credit is meant the union in one person of the opposite interests which are involved in an obligation. This may occur also in respect of one and the same obligation. A concourse of the latter kind results from the succession of the debtor in an obligation to the creditor, or of the creditor to the debtor, or of a stranger to both, whether as heir or by a singular title. The effect in general of a concourse in respect of one and the same obligation is to extinguish the obligation; but no process is required to effect this result. The extinction of the debt, in respect of such a concourse, operates *ipso jure*. See CONFUSIO.

345. The effect of a concourse is different where it occurs in respect of two separate obligations. Where the persons who are debtor and creditor in one obligation are at the same time creditor and debtor in another, which has originated in a separate transaction, and where the prestations in each case are of the same kind and therefore commensurable, there is in each of the persons a *concursus debiti et crediti*. Each party in the complex relation is at once the other's debtor and the other's creditor, so that the debts, commonly described as mutual, while they are not extinguished or diminished *ipso jure*, are capable of being used to cancel each other. Though the parties to an onerous contract are similarly related, the co-existing debts in that case are not commensurable, but are necessarily of different kinds, and therefore do not admit of mutual extinction otherwise than by complete implement of the obligation which lies on each.

SUBSECTION (2).—*Method of Effecting Compensation.*

346. Down till the last decade of the sixteenth century, a person whose creditor in one obligation was his debtor in another, when he was sued in a Scots Court for the debt which he owed, required to bring a counter-action if he wished to make the debt owed to him stand against it. With a view to the more economical administration of justice, Parliament at length intervened to do away with the need of such a counter-action, and to sanction in its stead the proponing of the counter-claim as a plea in defence. By the Act 1592, c. 143, it is provided that "onie debt *de liquido in liquidum,* instantly verified by writ, or oath of party, before the giving of decree, be admitted be all judges within this realm by way of exception, but not after the giving thereof in the suspension or in reduction of the same decree." The effect of sustaining the plea thus rendered competent is to extinguish the whole of the debt in one of the obligations, and so much of the debt in the other as is equal thereto.

347. The term compensation is applied to this process, after the name given to it by the Roman lawyers. But in the Roman law compensation, though it had either to be agreed to initially by the parties, or pleaded by one of them and sustained by the judge, operated *ipso jure,* and therefore to all effects as from the date of the concourse.[1] In the law of Scotland, on the contrary, compensation, while it has always to be pleaded and sustained,[2] does not operate *ipso jure.*[3] Consequently, it interrupts the currency of prescription only as from the date of its being pleaded, and, besides leaving possible a withdrawal of the plea at any time before decree,[4] it enables a creditor who has more than one claim against his debtor to set off against a demand on the part of the debtor such of the claims as is worst secured, or otherwise least for the creditor's advantage to keep up, even if it be that one which has most recently made a concourse.[5] The rule is, therefore, illogical, though firmly settled by decisions, that the decree sustaining compensation retroacts to the point of time when the two debts began to co-exist, so as to prevent the running of interest on either of them between that date and the period at which they are held to be mutually extinguished.[6]

348. It has been doubted[7] whether interest would be extinguished on a debt bearing interest, when no interest was due on the opposite side.

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[1] *D.* xvi. 2, 4, 10, 21 ; *C.* iv. 31, 4, 14.

[2] *Cowan* v. *Gowans,* 1878, 5 R. 581.

[3] Ersk. iii. 4, 12 ; Bell, Com. ii. 124.

[4] *Lord Balmerino* v. *Dick's Crs.,* 1664, Mor. 2681 ; *Haldane* v. *Duke of Douglas,* 1753, Mor. 2690.

[5] *Maxwell* v. *M'Culloch's Crs.,* 1738, Mor. 2550.

[6] *Cleland* v. *Stevenson,* 1669, Mor. 2682 ; *Maxwell, supra.*

[7] Bell, Com. ii. 124.

But if this were so, then on the principle which such a rule would suggest, any disparity between the interest on one of the debts and that on the other, when both bear interest, would prevent the decree from having a retroactive effect on interest, except in so far as the amount on the one debt is equal to that on the other. This is not consistent with the rule established by the decisions, that interest is stopped on both debts from the moment of concourse.

349. Although the process of compensation may be effected on a plea stated by the defender in the action for payment of the debt against which it is set up, it may still be necessary to raise a separate action for payment of the debt sought to be compensated if it exceed in amount the debt against which it is pleaded and if it is sought to recover the balance, where decree for the balance cannot competently be given in favour of the defender in the original process. In the Sheriff Court, however, a separate counter-action is never necessary for this purpose, as decree can competently be given against the pursuer for the whole amount of the debt which is pleaded in compensation, provided it may competently be so pleaded,[1] even although it exceed the amount of the debt claimed by the pursuer in his Initial Writ.[2] On the other hand, although a debt, whether liquid or illiquid, may not competently be pleaded in compensation this in no way precludes it being set up in defence, even against a liquid debt, if it is a valid answer to the pursuer's claim on any other principle of law.[3]

SUBSECTION (3).—*Recompensation.*

350. A plea of compensation by a defender may be met by a counter-plea of compensation at the instance of the pursuer in respect of another, separate, debt due by the defender to the pursuer, which has not been included in the original claim of the pursuer. This is termed recompensation. Recompensation is governed by the same rules as compensation; but, where recompensation is pleaded, matters generally resolve into an action of count and reckoning.[4]

SUBSECTION (4).—*Secured Debts.*

351. The plea of compensation is not barred by the existence of caution or a collateral security for the debt founded on in the plea. The effect of the plea is, in that case, to afford an additional security to the creditor in the debt thus founded on.[5]

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[1] *Christie* v. *Birrells*, 1910 S.C. 986.

[2] Sheriff Courts (Scotland) Acts, 1907 and 1913, Rule 55.

[3] See *e.g. British Motor Body Co., Ltd.* v. *Thomas Shaw (Dundee), Ltd.*, 1914 S.C. 922.

[4] Ersk. iii. 4, 19; Stair, i. 18, 6; iv. 40, 37; *Irvine* v. *Menzies*, 1711, Mor. 2686; *Cargill* v. *Baxter*, 1829, 7 S. 662; *Christie* v. *Keith*, 1838, 16 S. 1224; *Thomson* v. *Stephenson*, 1855, 17 D. 709.

[5] *Hannay & Sons' Trs.* v. *Armstrong Brs. & Co.*, 1875, 2 R. 399; 1877, 4 R. (H.L.) 43.

SECTION 2.—COMPENSABLE DEBTS IN GENERAL.

SUBSECTION (1).—*Must be Acquired Bona Fide.*

352. Every claim on which the plea of compensation is based must have been acquired *bona fide*, and not so as to circumvent the opposite party, or put third parties at an unfair disadvantage.[1] Subject to this fundamental condition, debts, to be compensable, must both be (1) of the same kind, (2) both liquid, and (3) both presently exigible.

SUBSECTION (2).—*Must be of the Same Kind.*

353. The debts are of the same kind when both are money debts, or when both consist in a quantity of some one substance, such as corn or wine, not further specified than as corn or wine, and therefore not of different quality. If debts, not originally *ejusdem generis*, be of consent or by decree reduced to terms of money, the effect of compensation goes no further back than to the time when the debts were thus made commensurable.[2] Neither ear-marked money nor a specific *corpus* in the case of any other fungible can be set off; nor can money, even if it be not ear-marked, when it is an alimentary debt,[3] or is held on deposit, or under appropriation to a particular purpose.[4] If the mandate of appropriation fall by the mandant's death or bankruptcy, the mandatory is on principle entitled, in a question with the mandant's representatives or creditors, to set off the sum against a debt due to him by the mandant.[5]

SUBSECTION (3).—*Must Both be Liquid.*

354. A debt is properly liquid when its amount is ascertained and constituted against the debtor by his writ or oath or by decree. But in the case of mutual debts, one which can forthwith be made liquid is deemed liquid, and is allowed to be pleaded in compensation of a liquid debt.[6] The condition of instant proof can in general be satisfied only by writ or oath of party, but in some cases the condition has been stretched so as to let in parole.[7] Where, however, the liquidating of an illiquid claim necessitates a protracted inquiry, or otherwise involves delay, as where it depends on the issue of a litigation, the person making the claim will not be allowed, in respect of it, to put off payment of a debt which is liquid and demandable;[8] but the Court is not without discretion in the matter, and pending the judicial decision of a claim which is disputed, as to its existence or its amount, process may in exceptional circumstances be sisted in an action brought to enforce payment of a liquid debt, if the action on the illiquid claim be raised previously to that on the liquid debt.[1] This has been done where no appreciable delay would result and the pursuer would suffer no hardship,[2] and where there were doubts as to the *bona fides* of the defences to the illiquid claims.[3] Both of the debts may be of known amount, while one of them has yet to be constituted *habili modo* against the debtor. If a reference to his oath be necessary, and if he admit the debt, the effect of compensation in stopping interest goes back to the time when by his admission the debt became due, because then it was an ascertained sum.[4]

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[1] *Finlayson* v. *Ross's Tr.*, 1829, 7 S. 698; *Lawson* v. *Burman*, 1831, 9 S. 478.

[2] *Murray* v. *M'Guffog*, 1711, Mor. 2687.

[3] *Reid* v. *Bell*, 1884, 12 R. 178.

[4] *Stewart* v. *Bisset*, 1770, Mor. *voce* Compensation, App. No. 2; *Stuart's Exrs.* v. *Stuart*, 1709, Mor. 2629; *Campbell* v. *Campbell*, 1781, Mor. 2580; *Campbell* v. *Little*, 1823, 2 S. 484; *Middlemas* v. *Gibson*, 1910 S.C. 577.

[5] *Crs. of Murray* v. *Chalmer*, 1744, Mor. 2626.

[6] *Ross* v. *Mags. of Tain*, 1711, Mor. 2568. See also *Henderson & Co., Ltd.* v. *Turnbull & Co.*, 1909 S.C. 510.

[7] *Seton*, 1683, Mor. 2566; *Brown* v. *Elies*, 1686, Mor. 2566; *Muir and Milliken* v. *Kennedy*, 1697, Mor. 2567.

[8] *Lawson* v. *Drysdale*, 1844, 7 D. 153; *Scottish North-Eastern Rly. Co.* v. *Thomas Napier*, 1859, 21 D. 700.

SUBSECTION (4).—*Must Both be Presently Exigible.*

355. A debt is presently exigible when, not having as yet suffered prescription, it is actually due, and its term of payment has come (*dies cedit et venit*). Mutual debts must both be presently exigible before they can rateably extinguish each other; for the plea of compensation presupposes a valid demand to have been made on the opposite side for payment, which can only be of a debt that is in fact now payable; and the *rationale* of compensation renders imperative an exact correspondence at the time between the two debts in respect of the time when they are payable as well as in other respects. Thus a person who owes a sum instantly payable cannot meet the demand for payment by pleading compensation on a debt due to him, but not yet payable, or on a debt the payment of which depends on the purifying of a condition. In order that either a future debt, in which *dies statim cedit sed non venit*, or a contingent debt, in which *dies nec cedit nec venit, nisi conditio extiterit*, may become so changed in character as to be then subject to compensation, one or other of two possible provisions of law must operate. Either the *jus exigendi* connected with the present debt must be suspended, until the debt which was future or contingent has in ordinary course become present by the arrival of the term of payment or the fulfilment of the condition; or, without any suspension of the *jus exigendi* as to the present debt, the counter debt, whether future or contingent, must, on a calculation of its present value, be commuted into a present debt. These alternative provisions of law originate in the equity which governs all adjustments in bankruptcy, and by the very reason which grounds their existence they are limited in their application to the balancing of accounts in bankruptcy.

356. A debt prescribed at the time of its being pleaded in compensation cannot be set off against one which is not prescribed, even although the former, before becoming prescribed, may have co-existed with the latter in such a way as to imply a concourse. This rule is absolute as regards the long negative prescription,[1] but as regards the shorter prescriptions is qualified by the exception of an instant reference to the debtor's oath to prove the resting-owing of the prescribed debt.[2]

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[1] Mackay, Pract. i. 509.

[2] *Munro* v. *Macdonald's Exrs.*, 1866, 4 M. 687.

[3] *Ross* v. *Ross*, 1895, 22 R. 461.

[4] *Watson* v. *Cunningham*, 1675, Mor. 2684.

357. The period of concourse with regard to compensable debts, as between solvent parties, is, then, the point of time prior to a demand for the payment of either, when the two debts began to co-exist as both of the same kind, both liquid and both presently exigible. There can be no concourse in respect of debts one of which arises after payment of the other has been lawfully demanded.

SECTION 3.—COMPENSABLE DEBTS IN BANKRUPTCY.

SUBSECTION (1).—*Application of General Rules.*

358. The Statute of 1592 does not distinguish between cases in which the parties are solvent and cases in which either or both of them are insolvent or bankrupt. It covers all these cases alike, provided that the mutual debts be of the character just explained. Thus, where two persons are mutually indebted, and one of them becomes bankrupt before either has paid the other, both of the debts being already payable, he who remains solvent is not bound to pay his debt in full and to accept a dividend in respect of the debt owed to him. His plea of compensation, though not stated till after the bankruptcy, goes back to the period of concourse, and, to the extent of the smaller of the debts, is of effect, as from that time, to extinguish both. If his debt to the bankrupt be the greater, he is liable to pay the difference, and no more, just as if both of the parties were solvent; but if the opposite debt to his be the greater, he has a claim to rank for the balance.

SUBSECTION (2).—*No Concourse after Sequestration.*

359. If the debt pleaded in compensation have been constituted or acquired within sixty days of notour bankruptcy, or at any time thereafter, with a view to create a preference, the ground of the plea may be cut away under the Statute 1696, c. 5;[3] but in the absence of such *mala fides* as is here implied, and especially where the one party is not proved and cannot be presumed to have known of the other's notour bankruptcy or insolvency, the Statute seems not to be relevant.[4] Sequestration, however, infers notice; and after the date of the first deliverance no *concursus* can be made which will enable a debtor to the bankrupt estate to plead compensation. Thus, for instance, though a tenant on his landlord's bankruptcy can set off a debt due to him by the landlord against arrears of rent, and even against the rent current at the date of the bankruptcy,[5] he cannot set it off against rents to become due after that date. In like manner a landlord, though on his tenant's bankruptcy he can compensate a debt due by him to the tenant on a claim for arrears and current rent, cannot on that claim compensate a debt due by him to the trustee under an agreement by which the trustee takes possession of the subjects for the purpose of winding up, on condition of the landlord's settling with him as an outgoing tenant.[1] Where, before the tenant's sequestration, the landlord has obtained possession of the crop, etc., he is entitled to set off against the price of it a claim for arrears of rent;[2] but where he has not previously obtained possession, he cannot, on the tenant's bankruptcy, either claim a preference for arrears, or plead compensation, on a stipulation in the lease that the tenant shall hand over the crop to the landlord.[3] So, again, on the failure of a banker, a holder of the banker's notes payable to bearer cannot plead them in compensation, unless he can shew that he has held them since before the failure. Where a trust deed for behoof of creditors stands effectual, no creditor can set off a claim accruing to him after the trust has been constituted.[4]

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[1] *Carmichael* v. *Carmichael*, 1719, Mor. 2677.

[2] Bell, Com. ii. 123.

[3] *Marshall's Tr.* v. *Provan & Co.*, 1794, Mor. 1144.

[4] *Hepburn* v. *Bell* (n.r.). See Bell, Com. ii. 124 n.

[5] See *Fraser* v. *Robertson*, 1881, 8 R. 347.

SUBSECTION (3).—*Balancing Accounts in Bankruptcy.*

360. The rule, demonstrably fair when both parties are solvent, that a debt presently payable cannot be compensated by one which is future or contingent, would work out unjustly, were it enforced, when either of the parties was bankrupt; for then it would compel the solvent party to pay twenty shillings in the pound and take a mere dividend in respect of his counter-claim. The law of Scotland admits no exception to the rule, even with reference to the circumstances of bankruptcy; but it provides practical remedies for what in those circumstances would otherwise be the inequitable result of the rule. At common law the creditor in a future or a contingent debt, though he cannot use diligence in execution before the term of payment has arrived, or the condition has been purified, may use diligence in security if the debtor be *vergens ad inopiam*. He may, for example, lay an arrestment on the debtor's moveables, so as to prevent their being alienated to his loss. As there are here two distinct obligations, that in which the common or principal debtor is debtor to the arrester, and that in which the arrestee is debtor to the common debtor, and as the primary effect of the arrestment is to suspend the *jus exigendi* of the common debtor, the two debts are virtually mutual debts between the arrester and the common debtor, for as long as the arrestment remains unloosed.

361. Where, again, mutual debts exist *primo loco*, where one of them is presently payable but the other not, and where the debtor in the latter is bankrupt, the creditor in the debt which is future or contingent virtually stands already in the same relation to the bankrupt as, after using arrestment in security, the arrester does to the common debtor. On the ground of reason or principle, therefore, on which the common law suspends the *jus exigendi* of the common debtor at the instance and for the security of the arrester, it suspends the *jus exigendi* of the bankrupt, at the instance and for the security of the creditor in the future or the contingent debt. The relationship of a debt presently payable to a debt future or contingent, is, in both cases alike, qualified by the suspensive condition; but whereas in the one case the mutual relation of the debts has itself to be established by a special process of law, in the other it is established by the mere conformity of the state of facts to a general rule of law.[1]

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[1] *Taylor's Tr.* v. *Paul*, 1888, 15 R. 313; cf. *Smith* v. *Harrison & Co.'s Trs.*, 1893, 21 R. 330.

[2] *Davidson's Tr.* v. *Urquhart*, 1892, 19 R. 808; *Jaffray's Tr.* v. *Milne*, 1897, 24 R. 602.

[3] *Maclean's Tr.* v. *Maclean of Coll's Tr.*, 1850, 13 D. 90; *Forbes Tr.* v. *Ogilvy*, 1904, 6 F. 548.

[4] *Mill* v. *Paul*, 1825, 4 S. 219; *Meldrum's Trs.* v. *Clark*, 1826, 5 S. 112.

362. From the point of view of the creditor, in whose favour the security is created, the suspension of the bankrupt's *jus exigendi* has the aspect of a power vested in the creditor to withhold payment of a debt, the term of payment of which has come, until he be satisfied in respect of a counter-claim, the term of payment of which has not yet come, or the payment of which is subject to a condition not yet purified. This is the point of view taken for the most part by the Scots text-writers, who have consequently been led to treat of the matter under the head of retention. The doctrine of retention is admittedly stretched beyond its proper compass when it is applied to debts.[2] In strictness, retention is a right which relates only to corporeal moveables, and emerges under conditions by no means identical with those present in the case of mutual debts. See RETENTION. The term "Balancing Accounts in Bankruptcy" would appear to be a more appropriate designation of the right now under consideration;[3] but in spite of the strained analogy which has brought debts within the scope of the doctrine of retention, the right that arises in appropriate circumstances to withhold payment of a debt in security of some counter-claim has now a prescriptive title to be termed retention.

363. The right of security founded on the existence of mutual debts, one of which is presently exigible but the other not, and on the bankruptcy of the party who is debtor in the latter, endures till the term of payment of the secured debt arrives, or till it be seen whether the condition on which payment depends is fulfilled or not. Compensation may or may not be the sequel of retention. It is so only when compensation is pleaded and sustained, and when by the mere efflux of time, or by the occurrence of a particular event, the future or the contingent debt has become a present debt. Retention by the creditor in a future or a contingent debt has of course compensation for its ultimate object; but it has security for its immediate object, and is always effectual as regards that, even although compensation be in the end precluded by the failure of the condition on which the provisionally secured debt depends. Before the modern practice of putting a present value on future and contingent debts received the authority of the Legislature, the final division of a bankrupt estate had to be postponed till in the course of events every contingent debt affecting the estate had been either changed into a pure debt or determined not to be payable at all. The only way to obviate such inconvenient delay in bringing the affairs of the bankruptcy to a close, where there were mutual debts and that which the bankrupt owed was contingent, was by the trustee's selling, at what might prove a serious loss to the estate, the reversion of the *jus crediti* connected with the debt retained by the person standing debtor in it.

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[1] Bell, Com. ii. 122.

[2] Bell's Prin., s. 1410.

[3] See Bell, Com. ii. 118; *Scott's Tr.* v. *Scott*, 1887, 14 R. 1043, per Lord Pres. Inglis at p. 1051.

SUBSECTION (4).—*Valuation of Future and Contingent Debts.*

364. The first statutory sanction of the expeditious plan now generally followed in dealing with future and contingent debts was given by the Bankruptcy Act, 1839.[1] Under the amended provisions on the subject first embodied in the Bankruptcy Act, 1856,[2] and now included in the Bankruptcy Act, 1913,[3] the present value of a future debt is the amount of the debt as at the term of payment, under deduction of interest from the date of sequestration, and of any discount beyond legal interest to which the claim is liable by the usage of trade applicable to it.[4] The present value of a contingent debt is, on the claimant's application, fixed by the trustee, or, if the trustee has not been elected, by the sheriff, subject to review by the Court.[5] The present value of any annuity granted by the bankrupt is similarly ascertained;[6] because an annuity for a definite period practically resolves into a number of future debts, the second having a more remote term of payment than the first, the third than the second, and so on; while an annuity for an indefinite period resolves into a series of contingent debts, each, after the first, being further contingent, as to its emergence, on the previous one's having become a pure debt at a point of time which marks the expiry of a regular interval.

365. It is open to the creditor to have a contingent debt valued or not. Even where he is *eodem tempore* debtor to the bankrupt in a debt presently exigible, and claims to set the one against the other, he may either retain the present debt, pending the issue of the contingency affecting the other, or have the contingent debt valued, if it be capable of valuation. The former alternative may result in the extinction of the whole debt owed by him, but it carries the risk of his having sooner or later to pay the whole; the latter alternative is the condition of immediate compensation.

366. A debt incapable of being valued, as where it depends on a potestative condition, is not therefore incapable of being ranked for; "the trustee would seem to be nevertheless bound to set apart a sum to provide a dividend for the debt until the issue of the contingency."[1] Such a debt will accordingly, it is thought, support the plea of compensation, to the present effect of entitling the creditor to retain a debt owed by him to the bankrupt estate, and to the subsequent effect, if the condition be purified, of rateably extinguishing both debts.

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[1] 2 & 3 Vict. c. 41.

[2] 19 & 20 Vict. c. 79.

[3] 3 & 4 Geo. V. c. 20.

[4] 1913 Act, s. 48.

[5] *Ibid.*, s. 49.

[6] *Ibid.*, s. 50.

367. Compensation is competent in bankruptcy on any debt which can be ranked for, where the term of payment of the correlative debt has already come; [2] and "every claim is admissible against the estate, to the effect of drawing a dividend or having it laid aside, which forms or may form against the bankrupt, during his life, a proper debt, whether due presently, or at a certain future time, or depending on a contingency which may emerge during the bankrupt's life.[3] Thus, although where both parties are solvent an illiquid claim of damages cannot be set off against a demand for the price of a subject sold,[4] such an illiquid claim can on the bankruptcy of the debtor be ranked for, and can consequently be pleaded in compensation.[5] So, too, debts not of the same species, *e.g.* corn and wine, or debts of the same species but not of the same quality, which are incompensable between solvent parties, may in bankruptcy be set off, both being in the process measured in money. In short, since a discharge in bankruptcy, whether in ordinary course of sequestration or on composition, frees the debtor from all liabilities, except debts to the Crown, incurred by him previously to the date of sequestration, the character which mutual debts must have, to admit of their being compensated when both parties are solvent, cannot in any of its particulars, *bona fides* excepted, be deemed necessary at the time of pleading, to ground compensation when one of the parties is bankrupt.

368. Where a solvent person, who is one of the creditors on a bankrupt estate, is also a debtor to the estate in a debt which remains during the sequestration future or contingent, he cannot plead compensation, and can only rank for his claim, unless the trustee, with consent of the commissioners, as empowered by s. 172 of the Act of 1913, compound the claim. Thus, where a party insured becomes bankrupt, indebted to the insurance company, the company cannot close the transaction by setting off the debt due by the bankrupt against the surrender value of his policy.[6] Where both parties are bankrupt, future and contingent debts on each side may be converted into present debts, and then set off.

SECTION 4.—PERSONS BETWEEN WHOM COMPENSATION IS COMPETENT.

369. Mutual indebtedness being presupposed, persons may stand in the relation, either through their being the original parties in each of the obligations or through their having become parties by succession, and either as being the sole debtors respectively or as having co-obligants. In every case, for compensation to be competent between them, they must each bear the same jural character in the one obligation as in the other.

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[1] Goudy, 318.

[2] Bell, Com. ii. 122.

[3] Bell, Com. i. 333.

[4] *Mackie* v. *Riddell*, 1874, 2 R. 115.

[5] *Sim* v. *Lundy & Blanshard*, 1868, 41 Sc. Jur. 136; 6 S.L.R. 192.

[6] *Borthwick* v. *Scottish Widows' Fund*, 1864, 2 M. 595.

370. Each of the parties mutually indebted may be in that position, either as a direct result of the transactions which gave rise to the debts, or as having come *titulo universali vel singulari* into the place of some previous debtor or creditor. The transfer of a claim by assignation is the only case that needs special comment. An assignation may serve either to produce a concourse or to put an end to one, and as long as both of the persons, who in virtue of the assignation are made mutual debtors or are taken out of the relation, are solvent, there is no reason for laying any restraint of law on the exercise of power to assign. Accordingly, where one person is debtor to a second, and the second to a third, an assignation by the third party in favour of the first, if granted and intimated before payment has been demanded by the second party of his claim against the first, will make the first party, instead of the third, the creditor of the second, and, through the concourse thus established, will enable either the first party or the second to plead compensation against the other. If, however, the right of the assignee be not completed by intimation before the other debt has been demanded, or has been vested in a fourth party, concourse through the assignation will be prevented, and so there will be no compensation.[1] On the other hand, where two persons are mutually indebted, an assignation by either of them in favour of a third party, if granted and intimated before payment of the other debt has been demanded, or compensation pleaded on that other debt, will destroy the concourse, and render compensation incompetent between the cedent and his creditor, as well as between the assignee and his debtor. If, however, the right of the assignee be not completed by intimation, or if the other debt has been constituted prior to the assignation, the concourse still subsists, to the effect of enabling the creditor of the cedent, as debtor to the assignee, to plead compensation against the assignee.[2]

371. The principle of justice strikes at the unfair preference which the creation of a concourse by means of an assignation after bankruptcy would bring about. No debtor, therefore, to the bankrupt can take an assignation to a claim against the bankrupt, so as to set off that claim against the debt owed to the estate. Thus the indorsee of a bill, indorsed subsequently to the bankruptcy of the proper debtor, cannot set it off against the debt demanded from him by the trustee. When, however, previously to the bankruptcy, an indorsee has discounted a bill on which he then had a right to plead compensation, and when he is forced or chooses to take it up after the bankruptcy, he is restored to the position in which he stood before he discounted the bill, and may plead compensation on it.[1]

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[1] *Alison* v. *Duncan*, 1711, Mor. 2657.

[2] Bell, Com. ii. 138 (131, M'L.'s ed.); *Paton* v. *Barclay*, 1627, Mor. 2601; *Shiells* v. *Ferguson, Davidson & Co.*, 1876, 4 R. 250; *Livingston* v. *Reid*, 1833, 11 S. 878; see also Bell's Prin., s. 575.

372. The dissolution, by means of an assignation, of a concourse which existed at the date of bankruptcy can give rise to no preference, when the assignation is by a creditor of the bankrupt, and the assignation seems therefore to be competent, though practically in the circumstances the power to assign can seldom have an object to call it into exercise. But when the assignation is by the trustee, the consequent dissolution of the concourse must be to the prejudice of the opposite party; and the Court will therefore grant interdict to prevent the trustee from indorsing, for example, a bill to third parties for value, so as to deprive the acceptor of a plea of compensation.[2]

373. An implied assignation is of the same effect in questions of compensation as an express assignation, and is subject, in general, to the same conditions in restraint or control of its operation. Where, for instance, a law agent, in virtue of his hypothec, claims the costs, awarded to his client in an action, from the party found liable, the party thus required to pay cannot set off against the costs a debt due to him by the opposite party; because the implied assignation to the agent, of his client's claim for costs, is deemed to have been made simultaneously with the raising of the action, and the fact of the litigation is deemed equivalent to notice of the assignation.[3]

374. The rule, that where a private debtor of one of the partners of a company sues the firm for a company debt, the firm may set off the partner's claim against the demand, is explained on the ground of implied assignation.[4] But in cases of bankruptcy the rule, though firmly established by decisions,[5] does not appear to be defensible on principle; for if the debtor to the partner be bankrupt, and his trustee sue the firm, the partner is not in a position to assign more than a claim for a dividend.

375. If one of the partners of a solvent company become bankrupt, either when he is in debt to the company but has a private claim against one of the solvent partners, or when he has a claim against the company but is in debt to one of the solvent partners, the solvent partner or the company, as may be, is not allowed to plead compensation against the bankrupt.[6] Here the principle is sound, that an implied assignation by the company to the solvent partner, or by the solvent partner to the company, would create an unfair preference.

376. Except under special circumstances, a debt due to or from several persons jointly cannot be set off against a debt from or to one of such persons separately.[1] But where a person who is separately indebted has one or more co-obligants, any of the co-obligants, as possessed of interest, may plead compensation, even if the principal obligant be passive or averse. This has been so decided in a number of typical cases, though the doctrine was impugned in the eighteenth century.[2] Thus an heir, sued for his ancestor's debt, has been held entitled to compensate it with a debt owed by the creditor to the defunct, though the latter debt, being moveable, belonged to the executor and not to the heir.[3] The reason appears to be, that while the heir in heritage who pays a moveable debt has a claim of relief against the executor, the liability of the heir to pay such a debt is not conditional on the executor's being first discussed. A cautioner in a bond has an obvious interest to extinguish the debt in the bond, and so, if he be also debtor to the person for whom he is cautioner, he is entitled to withhold payment till he be relieved of his cautionary liability.[4] So with regard to the indorser of a bill, as indebted under a separate obligation to the debtor in the bill;[5] though the debtor cannot compensate with any debt due to him by the indorser.[6] On the same principle, a creditor in a competition, because of the interest which he has to increase the fund of distribution by the cancelling of another creditor's claim, has been held entitled to plead compensation of that claim on a debt due by the claimant to the common debtor, even when the common debtor had neglected to propone the plea in the process of constitution against him.[7]

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[1] *Hannay & Sons' Tr.* v. *Armstrong & Co.*, 1875, 2 R. 399; 1877, 4 R. (H.L.) 43.

[2] *Harvey, Brand & Co.* v. *Buchanan, Hamilton & Co.'s Tr.*, 1866, 4 M. 1128.

[3] *M'Kenzie* v. *Ross*, 1823, 2 S. 401; *Strain* v. *Strain*, 1890, 17 R. 566.

[4] *Thomson* v. *Stephenson*, 1855, 17 D. 739.

[5] *Bogle* v. *Ballantine*, 1793, Mor. 2581; *Scott* v. *Hall & Bisset*, 13th June 1809, F.C.; *Russell* v. *M'Nab*, 1824, 3 S. 63; *Salmon* v. *Padon & Vannan*, 1824, 3 S. 406.

[6] *Galdie* v. *Gray*, 1774, Mor. 14598.

377. Each of the parties mutually indebted must be creditor in the same jural character as that in which he is debtor. There can be no *concursus* where, for example, either party is creditor in a fiduciary or other special character, and debtor in his private capacity; because in that case he is in truth two different persons, and concourse means the union in one person of the opposite interests involved in an obligation. Thus a tutor or a judicial factor, while he may, on a debt due to the pupil, or to the trust estate, compensate a bond granted by him as tutor or factor,[8] cannot set off a debt owed to him in his fiduciary character against one which he owes on his own account.[9] So an executor, though he may set off a debt due to the estate against one due by the person deceased, cannot in general compensate a debt of his own with one payable to him as executor.[10] Where he has the sole beneficial interest in the estate, he may, it is thought,[11] compensate a debt owed by him *proprio nomine* with one due by his creditor to the defunct; because a debt payable to the executor, as executor, is in this case really payable to him for his own behoof, and equity has regard to the fact. Even an executor who has only a partial interest, such as a residuary one, may, it would seem, to the extent of that interest, set off a debt payable to the estate against one exigible from him as a debt of his own; but the debtor to the estate has a right in the circumstances to be satisfied of the adequacy of the executor's beneficial interest. On the other hand, as the executor is *eadem persona cum defuncto*, a debt due to the executor *qua* executor may be compensated by a debt due by the deceased.[1] Where several persons are conjoined in a fiduciary office, no one of them, without having first obtained an assignation for value of the claim of the trustees as a body, can compensate, on a debt due to the trust estate, a debt owed by him as an individual.

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[1] *Burrell* v. *Burrell's Trs.*, 1916 S.C. 729.

[2] Kilk. 134; note to report of *Middleton* v. *Earl of Strathmore*, 26th February 1742.

[3] *Hay* v. *Crawford*, 1712, Mor. 2571.

[4] *Town of Aberdeen* v. *Strachan*, 1709, Mor. 2570.

[5] *Hannay & Sons' Tr.*, *supra.*

[6] *Scougall* v. *Ker*, 1762, Mor. 1641; see *London Joint Stock Bank* v. *A. Stewart & Co.*, 1859, 21 D. 1327.

[7] *Rae* v. *Clerk*, 1738, Mor. 2571; *Middleton* v. *Earl of Strathmore*, 1743, Mor. 2573.

[8] *Earl of Northesk* v. *Gairn's Tutors*, 1670, Mor. 2569.

[9] *Elliot* v. *Elliots*, 1711, Mor. 2658.

[10] *Stuart* v. *Stuart*, 1869, 7 M. 366.

[11] Bell, Com. ii. 125.

378. Support for the exceptions thus stated to the rule concerning executors or other fiduciaries may be found in certain specialties of the law as to compensation in partnership. Although in Scotland a firm is a distinct person from the persons who compose it, a sole surviving partner, since he alone has the right to sue for partnership debts, may to the utmost limit compensate his private debts with those of the company.[2] And again, if two or more firms with different names consist of the same partners, they are held to be in reality only one company, so that a debt due to one of the firms may be set off against a debt due by the other, or one of the others.[3] Substantial identity is thus recognised as of greater consequence in law than nominal difference. But there is no such identity between two companies, when some of the partners of the one are the sole partners of the other; and it is thought, therefore, though the point has not been decided, that a debtor to the one company cannot plead compensation on a claim which he has against the other.[4]

379. By reason of a firm's separate existence as a person, compensation may be pleaded, on either part, between a solvent firm and other persons, whether partners of the company or not, but it has no proper place either between the firm and a third party as debtor or creditor of one of the partners, or between a partner and a third party as debtor or creditor of the firm.[5] Where, however, a solvent company is dissolved, a person sued as debtor to the company may, if he be also creditor to one of the partners, plead compensation to the extent of that partner's share in the assets of the company, because on the dissolution of a firm otherwise than by bankruptcy a debt due to it becomes the property of the partners as individuals.[6] Where, on the other hand, one of the partners of a company which is bankrupt or otherwise dissolved, sues a creditor of the company for a private debt, the latter may plead compensation on his claim against the company;[1] because the liability of a partner for the company debts logically carries with it a liability to encounter the plea of compensation. Where, again, on failure to obtain payment from the company of a debt constituted against it, a creditor of the company sues one of the partners for the company debt, the partner thus called on to pay may plead compensation on a debt due to him as an individual by the creditor of the company;[2] for as soon as personal liability is actually fixed on him, he, as an individual, is in effect substituted for the company as debtor, and, since he is at the same time in his private capacity a creditor of the pursuer's, the necessary *concursus* is at once established.

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[1] *Mitchell* v. *Mackersy*, 1905, 8 F. 198.

[2] See *Thomson* v. *Stephenson*, 1855, 17 D. 739.

[3] *William's Tr.* v. *Inglis, Borthwick, Gilchrist & Co.*, 13th June 1809, F.C.

[4] See *Mitchell* v. *Canal Basin Foundry Co.*, 1869, 7 M. 480.

[5] *Mackie* v. *M'Dowall*, 1774, Mor. 2575; *Thom* v. *North British Banking Co.*, 1850, 13 D. 134. But see *Thomson* v. *Stephenson*, *supra*.

[6] *Heggie* v. *Heggie*, 1858, 21 D. 31; *Mitchell* v. *Canal Basin Foundry Co.*, *supra*.

380. Between a bankrupt firm and its partners compensation is excluded, since no partner can claim, even for excess advances, in competition with the general creditors of the company.[3]

381. The liquidator of a public company is held to be a different person from the company, and therefore, as on the whole the decisions bear out, when such a company is in process of being wound up, a shareholder cannot on a claim against the company compensate calls due by him.[4] It is not certain that compensation will be admitted even in the absence of an order for winding up.[5]

382. Transactions which involve agency ground compensation between the principal and the person with whom the agent or factor deals avowedly as agent or factor, but not between the agent and such person, even when the principal remains undisclosed.[6] Where, however, the agent or factor deals in his own name, whether allowed or privately forbidden by the principal to do so, compensation may be pleaded, on either side, between the agent, in respect of a private debt, and the person with whom he deals.[7] If the agent hold a *del credere* commission, he is liable in the first instance for the debt to his principal, though the principal has collateral recourse against the debtor; and such an agent appears therefore to have a right, as he has in English law,[8] to compensate on the debt for which he is thus responsible, any debt incurred by himself to the same debtor. But that debtor, on being sued by the principal, cannot meet the demand with a plea of compensation founded on a claim against the agent *privato nomine*; because the *del credere* commission, though it qualifies the relation of principal and agent, in which it originates, touches no interest outside of that relation, and so cannot modify the relation of the agent to a third party. For the same reason, a principal, even when his agent holds a *del credere* commission, may, on a claim accruing through the agent, compensate a debt due to the person with whom the agent has transacted.[1]

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[1] *Russell* v. *M'Nab*, 1824, 3 S. 63; *Christie* v. *Keith*, 1838, 16 S. 1224.

[2] *Lockhart* v. *Ferrier*, 1842, 4 D. 1253.

[3] See *Johnston* v. *Losh*, 1844, 6 D. 627; *Ex parte Sillitoe*, 1824, 1 G. & J. 374.

[4] *Cowan* v. *Gowans*, 1878, 5 R. 581; *Cowan* v. *Shaw*, 1878, 5 R. 680.

[5] *Cowan* v. *Gowans*, *supra*, per L. Shand at p. 587.

[6] *Liddle* v. *Young*, 1852, 14 D. 647; *Miller* v. *M'Nair*, 1852, 14 D. 955; *Lavaggi* v. *Pirie & Son*, 1872, 10 M. 312; *Matthews* v. *Auld & Guild*, 1874, 1 R. 1224.

[7] *Johnston* v. *Scott & Son*, 14th November 1818, F.C.; *Gall* v. *Murdoch*, 1821, 1 S. 75.

[8] *Grove* v. *Dubois*, 1786, 1 T.R. 115; *Peele* v. *Northcote*, 1817, 7 Taun. 478.

383. Compensation may be pleaded when cross-awards of expenses have been made in the same action, but not between awards of expenses in different actions, as the right of the agent-disburser cannot be cut down by an extrinsic claim.[2] The application of this principle has been extended to two sets of expenses arising out of the same matter, though in different actions.[3]

384. In connection with a policy of marine insurance, the broker, as the common agent of both parties, may either have settled or not with the underwriters. When he has done so, he is the creditor of the party insured, between whom and the underwriters there is therefore no ground of concourse.[4] When, however, the broker has not settled with the underwriters, the party insured may meet any claim brought against him in name of the underwriters with a plea of compensation in respect of a counter-claim.[5]

SECTION 5.—STATUTORY BAR OF THE PLEA.

385. Omission to plead compensation by way of exception in the course of an action bars the plea *post sententiam*, whether by way of suspension or of reduction,[6] and, unless perhaps when there is error of fact or of law, bars a *condictio indebiti*,[7] but does not exclude retention.[8] When, however, compensation has been proponed, but wrongly repelled, it may be pleaded anew in a suspension or a reduction, if either process be otherwise competent. Notwithstanding the provision by 1672, c. 16, that all defences competent in law may be pleaded against a decree in absence, decrees in absence, as well of the Court of Session as of inferior Courts, are accounted decrees which by the Statute of 1592 bar compensation. Exceptions to the rule are admitted in such cases as those in which the decree in absence has followed on a summons against one of several debtors included in the same summons,[9] or has been set aside as null, or the charge has been turned into a libel.[10] But a decree of furthcoming, pronounced in absence of the arrestee, bars the arrestee from pleading compensation by way of suspension against the arrester on a debt due to the arrestee by the common debtor.[1]

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[1] *Ferrier* v. *British Linen Co.*, 20th November 1807, F.C.

[2] *Gordon* v. *Davidson*, 1865, 3 M. 938; *MacGillivray* v. *Mackintosh*, 1891, 19 R. 103; *Fine* v. *Edin. Assurance Co.*, 1909 S.C. 636.

[3] *Lochgelly Iron and Coal Co.* v. *Sinclair*, 1907 S.C. 442; *Oliver* v. *Wilkie*, 1901, 4 F. 62; cf. *Paolo* v. *Parias*, 1897, 24 R. 1030.

[4] *Bertrams* v. *Hodge*, 30th November 1810, F.C.

[5] *Kirk & Grieve* v. *Bennet*, 1st December 1812, F.C.

[6] 1592, c. 143.

[7] *Hamilton* v. *M'Queen's Trs.*, 1845, 7 D. 295.

[8] *Crs. of Glendinning* v. *Montgomery*, 1745, Mor. 2573.

[9] *Corbet* v. *Hamilton*, 1707, Mor. 2642; *A.* v. *B.*, 1747, Mor. 2648.

Wright v. *Sheill*, 1676, Mor. 2640.

386. There is an exception to this general rule in the case of decrees for expenses. Compensation may be pleaded in a suspension of a charge on a decree for expenses even though it has not been pleaded before the decree was pronounced.[2]

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[1] *Cuninghame, Stevenson & Co.* v. *Wilson & Co.*, 17th January 1809, F.C.

[2] *Fowler* v. *Brown*, 1916 S.C. 597.

COMPENSATION FOR ACCIDENTS.

See WORKMEN'S COMPENSATION.

COMPETENT AND OMITTED.

See PRACTICE AND PROCEDURE.

COMPETITION.

See MULTIPLEPOINDING; SEQUESTRATION.

COMPLAINT.

See CRIME (PROCEDURE).

COMPLETION OF TITLE.

TABLE OF CONTENTS.

PAGE
- Introductory 169
  - Real Rights by Infeftment . . 169
  - Real Rights without Infeftment . 170
  - Result of Non-infeftment . . 171
- Historical 172
  - Sasine and Infeftment . . . 172
  - Proper and Improper Investiture—Precept of Sasine . . . 172
  - Symbolical Delivery 173
  - Instrument of Sasine—Registration 173
  - Entry with Superior 174
  - Service of Heirs 175
  - Precept of *Clare Constat* . . 175
  - Tinsel of Superiority 176
  - Entry by Resignation 177
  - Base and Public Infeftment . . 179
  - Entry by Confirmation. . . . 180
  - Combined Charters 182
  - Burgage Tenure 183
- Infeftment 183
  - Instruments of Sasine 183
  - Direct Registration 184
  - Clause of Direction 187
  - Notarial Instruments and Notices of Title 188
  - Warrants of Registration . . . 193
  - Sasine *ex propriis manibus* . . 197
- Service of Heirs 199
  - Character of Heir. 199
  - Service of Heirs after 1847 . . 200
  - Liability of an Heir for his Ancestor's Debts 202
  - Effect of Decree of Service . . 202
    - Special Service 202
    - General Service. 203
  - Declaratory Services 204
  - Vesting in Heirs 205
  - Services in Trust 205
- Completion of Title by Heirs . . 206
  - Infeftment Act, 1845 206
  - Service of Heirs and Crown Charters Acts of 1847 206
  - Precepts and Writs of *Clare Constat* 207
  - Infeftment on Decree of Service . 211
  - Completion of Title to Personal Rights by Survivance . . 212
  - Completion of Title by Heir of Grantee of Trust Deed for Creditors 213

PAGE
- Completion of Title by Disponees . 213
  - Original Vassal 213
  - Entry with the Superior between 1845 and 1874 213
    - By Confirmation 213
    - By Resignation. 215
    - By Combined Charter . . . 218
  - Implied Entry 218
  - Identification of Disponee . . 219
    - Descriptive Disponees . . . 220
    - Nominate Conditional Institutes. 221
    - Dispositions to Persons with Different Interests. . . . 222
    - Conveyances in Liferent and Fee. 223
    - Identification of Property . . 224
- Completion of Title of General Disponee 225
- Completion of Title by Assignee of Unfeudalised Conveyance . 227
  - Infeftment prior to 1858 . . 227
  - Statutory Forms of Assignation . 227
  - Infeftment by recording Notarial Instrument or Notice of Title . 228
  - Infeftment by recording Disposition along with Instrument or Notice 228
  - Infeftment by recording Disposition along with Assignation . . 229
  - Infeftment of Assignee of Personal Right by Survivance . . 230
  - Disposition by Person Uninfeft . 231
  - Deduction of Title 232
  - Competition between Assignees . 235
- Completion of Title of Trustees and Legatees 235
  - Original Trustees 235
  - Trustees assumed or appointed in Succession 236
  - Heir of sole or last Surviving Trustee 237
  - *Ex officio* Trustees 238
- Completion of Title under Decree of Court 239
  - Beneficiaries in Lapsed Trust. . 239
  - Trustees and Factors appointed by the Court 240
  - Adjudgers 242
  - Under Decree of Division of Common Property 242
  - Under Decree of Division of Glebe . 242
- Completion of Title to Lands acquired Compulsorily 242

TABLE OF CONTENTS (*continued*).

	PAGE
Completion of Title by Judicial Assignees	244
Trustee in Sequestration	244
Liquidator of Company	245
Completion of Title to Heritable Securities	246
Before 1845	246
Between 1845 and 1847	246
Between 1847 and 1868	247
Completion of Title to Heritable Securities (*continued*)—	
After 1868	247
Completion of Title to Real Burdens and Ground Annuals	247
Completion of Title to Registered Leases	247
Completion of Title to Terce and Courtesy	247

SECTION 1.—INTRODUCTORY.

SUBSECTION (1).—*Real Rights by Infeftment.*

387. By completion of title, when employed with reference to heritable rights, is meant the conveyancing procedure whereby a *jus ad rem* or personal right may be converted into a *jus in re* or real right. It is impossible to deliver or to hold possession of land in the same manner as corporeal moveables are delivered or held, and possession cannot therefore be the test of a real right to land. Land may be given as security for a debt and possessed under redeemable rights, or may be vested in trustees, or limited rights of property in it may be constituted. Hence in all civilised countries the great object of conveyancing has been and is to render the forms by which property in land is transferred so distinctive, and at the same time so public, that no doubt may rest on a point of so much importance as property in land.[1] Where a feudal estate has been transferred in such a way that the new proprietor has acquired a real right in it, such proprietor is said to have completed his title, or to have taken infeftment, or to be infeft. Infeftment does not infer beneficial enjoyment, and infeftment may be taken though entry to the heritage is postponed.[2]

388. There can be no infeftment except on or under a grant from the Crown, mediate or immediate.[3] This follows from the consideration that infeftment is a feudal act, and that the Crown is the head or lord paramount of the feudal system. Disposition and sasine in feudal form will not suffice to convert udal lands into a feu-holding, or to give a true infeftment if there is no feudal chain of title going backward and upward to the Crown.[4] Under the modern system of land rights recording in the Register of Sasines and infeftment are frequently regarded as synonymous, but registration was not always necessary for infeftment, and even after registration was introduced, the two acts—or at least the two steps in one act—remained distinct for over 200 years. It was not until 1847 that it was held,[5] and even then not without considerable difference of opinion, that without registration there could be no completed infeftment: in other words, that an unrecorded sasine was null. While there can be no infeftment now without registration, it would be misleading to lose sight of the fact that, so far from the act of sasine having been simply declared unnecessary and abolished, the act of registration has by statute [1] been declared to import the force and effect of sasine. There may be registration without infeftment, of which there are instances in the case of udal property, registered leases,[2] real burdens,[3] and the cases where registration in the Register of Sasines completes a right to a *jus crediti* to heritable property, not by way of infeftment, but by operating as an equivalent to intimation to the holder of the feudal title.[4] Registration in each of these cases completes the right, but nevertheless there is no infeftment.

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[1] Bell on Completing Title, 1.

[2] *Burgh Smeaton* v. *Whitson & Ors.*, 1907, 14 S.L.T. 839.

[3] Bell's Prin., s. 675.

[4] *Beattons* v. *Gaudie*, 1832, 10 S. 286.

[5] *Young, etc.* v. *Gordon's Trs.*, 1847, 9 D. 932.

SUBSECTION (2).—*Real Rights without Infeftment.*

389. The following is a list of those exceptional cases in which infeftment is unnecessary for the constitution of a real right or *quasi* real right in heritage.

1. The estates of the Crown and Prince, including the paramount superiority of the whole land of the realm. This exception does not embrace the private estates of the Sovereign for the time being.[5]

2. Churches, churchyards, manses, and glebes of the Church of Scotland, including glebes acquired by excambion sanctioned by the presbytery.[6] The title to the glebe is an Act of designation by the presbytery.[7]

3. Udal lands in Orkney and Shetland.

4. Exceptions apparent rather than real occur in the case of certain subjects which belong to burghs and universities, where an original infeftment may be assumed, perhaps before the institution of land registers.[8]

5. Leases. At common law and under statute [9] the mode of completing a right under a lease, or under an assignation thereof, is by possession, *i.e.* actual natural possession, if possible, or civil possession by intimation to a sub-tenant, if there be such. As regards leases registrable under the Registration of Leases (Scotland) Act, 1857,[10] recording is an alternative method of completing a title, and if advantage is to be taken of the privileges conferred by the Act, *e.g.* the constitution of a security over the lease without possession, recording is essential.[11]

6. Kindly tenants and the somewhat analogous rights introduced

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[1] 31 & 32 Vict. c. 101, s. 15.

[2] See LEASES.

[3] See BURDENS, vol. ii. 245.

[4] *Edmond* v. *Mags. of Aberdeen*, 1855, 18 D. 47; affd. 3 Macq. 116.

[5] 37 & 38 Vict. c. 94, ss. 59–60.

[6] *Cadell* v. *Allan*, 1905, 7 F. 606.

[7] Ersk. ii. 3, 8. See CHURCH, vol. ii. 358.

[8] *Wallace* v. *St. Andrews University*, 1904, 6 F. 1093.

[9] 1449, c. 18.

[10] 20 & 21 Vict. c. 26.

[11] See LEASE.

by the Dwelling Houses (Scotland) Act, 1855,[1] and the Small Landholders (Scotland) Acts, 1886 to 1911.[2]

7. Real burdens which do not constitute feudal estates in the creditor's person. Prior to 1874 transfers were completed, not by registration, but by intimation to the debtor; but by s. 30 of the Conveyancing Act of 1874,[3] registration is made the criterion "in competition with third parties."

8. Servitudes (*q.v.*).

9. Assignees of liferents. No person except the original liferenter can be infeft in a liferent.[4]

10. Personal bonds excluding executors and annuities and other rights which are heritable in some respects as having a tract of future time do not, of course, admit of infeftment.

Though rights of succession under trust settlements may be held heritable in the person of the beneficiary, they do not form any proper exception to the general rule that infeftment is necessary to complete the title, for the title is, or ought to be, complete by infeftment in the persons of the trustees.

SUBSECTION (3).—*Results of Non-infeftment.*

390. Subject to the exceptions which have been stated, the following results follow where there is no infeftment.

1. The granter is not divested. The consequence is that the uninfeft grantee is exposed to the granter's debts and deeds.[5]

2. The grantee is not invested. Accordingly, the grantee can grant no warrant for infeftment to anyone else; and even his leases are not good against singular successors.[6] The provisions of s. 3 of the Conveyancing Act of 1924,[7] whereby an uninfeft person can grant a disposition under which the grantee may become infeft, are not really at variance with this principle; for the theory of that section is that, combined with the disposition by the uninfeft person, there is a notice of title on behalf of the grantee. Further, a conveyance by an uninfeft attorney, a trustee in sequestration, the liquidator of a company, a tutor, *curator bonis* or other guardian may enable the grantee to take immediate and direct infeftment, provided the title of the constituent, bankrupt, company, or ward is complete.[8]

3. Prior to the commencement of the Conveyancing Act of 1874 where an heir did not take infeftment in property in which his ancestor died infeft, the heir's debts and deeds had no effect against the property, except as regards his onerous debts and deeds if he had been three years in possession.[9]

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[1] 18 & 19 Vict. c. 88.

[2] 49 & 50 Vict. c. 29; 50 & 51 Vict. c. 24; 54 & 55 Vict. c. 41; 1 & 2 Geo. V. c. 49.

[3] 37 & 38 Vict. c. 94.

[4] Ersk. ii. 9, 41; *Ker's Trs.* v. *Justice*, 1868, 6 M. 627.

[5] Bell's Prin., s. 802.

[6] *Gordon* v. *Milne*, 1780, Mor. 10309.

[7] 14 & 15 Geo. V. c. 27.

[8] See *infra*, para. 428.

[9] 1695, c. 24.

4. Infeftment is a necessary foundation for the plea of positive prescription.[1]

5. Prior to the commencement of the Conveyancing Act of 1924 property yielded no terce unless the husband died infeft or infeftment had been fraudulently delayed.[2]

SECTION 2.—HISTORICAL.

SUBSECTION (1).—*Sasine and Infeftment.*

391. Sasine according to the old law was the symbolical delivery of possession of feudal subjects by or on behalf of the superior to his vassal, and this symbolical delivery was indispensable for the completion of the vassal's title. Real and actual possession of the land was not essential and was of no avail without delivery in solemn form.[3]

392. The term "infeftment" is sometimes used as synonymous with "sasine," but it is more properly used to describe both the act of completing a real right to heritable subjects held by any of the feudal tenures, and the writ or instrument in which the act is narrated and by which it may be proved.[4]

SUBSECTION (2).—*Proper and Improper Investiture—Precept of Sasine.*

393. Where delivery was given to the vassal by the superior in person there was said to be "proper investiture." But at an early stage in our history the personal attendance of the superior was dispensed with, and a mandate was addressed by the superior to his bailie, commanding the bailie to give sasine to the vassal. This mandate or precept of sasine was at first a separate writ, but afterwards came to be incorporated in the charter given by the superior to his vassal.[5] The Statute 1672, c. 7, enacted that a precept should be incorporated in all Crown charters and subject-superiors were not long in following the practice thus legalised. When delivery was given to the vassal not by the superior himself but by his bailie there was said to be "improper investiture."

394. The form of the precept of sasine was purely customary and was developed as transmissions of land increased in number. For the general form of precept in use at the beginning of the nineteenth century, see CHARTER (FEUDAL) (Vol. III. p. 239). Such a precept was sometimes styled a general precept to distinguish it from a special precept which was a warrant for giving sasine to the grantee in some special kind of right, such as a mere liferent.[6] Precepts might also be classed as definite and indefinite.[7] The former limited the tenure of the lands to which it had reference, *e.g.* by the addition on the occasion of an original feu charter, of the words "to be held in manner foresaid, and for payment of the feu-duties above specified." The usual form of precept was indefinite and was sufficient warrant for the giving of sasine to the grantee whether he was to hold the lands as the vassal of the granter of the precept (*a se*) or of the granter's over-superior (*de superiore suo*).

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[1] 1617, c. 12. See PRESCRIPTION.

[2] See TERCE.

[3] Bell's Prin., s. 769.

[4] Rodger's Feudal Forms, 1.

[5] Ross, Lect. ii. 130; Bell, Convey. 576.

[6] Bell's Prin., ss. 876, 877.

[7] *Ibid.*, s. 818.

395. When the precept had been executed and sasine had followed in terms of it, the precept was said to be exhausted; [1] but until sasine had been given to the full extent authorised the precept was unexhausted. Thus if the precept was conceived in favour of B. in liferent and C. in fee, the giving of sasine to B. in liferent did not exhaust the precept, and it was competent to C. or his successors subsequently to take sasine in the fee. An unexhausted precept was assignable by the grantee, but not by the granter.[2] Being a mandate it originally expired on the death of either granter or grantee, but by the Statute of 1693, c. 35, it was provided that procuratories of resignation and precepts of sasine should in all time coming continue in full force and be sufficient warrants not only for making of resignations and taking sasine in favour of the parties to whom they were granted, but likewise in favour of their heirs, assignees, and successors, having right to the said procuratories and precepts, either by a general service or by disposition and assignation or by adjudication as well after as before the death of the granters, or parties to whom they were granted, or both.

SUBSECTION (3).—*Symbolical Delivery.*

396. Until 1845 where any feudal property was transferred the transference required to be in solemn manner by delivery of appropriate symbols.[3] For a description of the ceremony of delivery and of the symbols appropriate to various classes of property, see CHARTER (FEUDAL).[4]

SUBSECTION (4).—*Instrument of Sasine—Registration.*

397. At one time ceremonial giving of sasine was alone sufficient to transfer the property, but at least as early as the beginning of the fifteenth century [5] notarial instruments containing a narrative of the ceremony began to come into use and were early recognised as the only admissible evidence that sasine had been given and that the grantee had acquired a real right.[6] The instrument of sasine, as it was called, described the subjects transferred and detailed the ceremony, thus defining not only the nature and extent of the subjects transferred, but affording evidence that all the requisite forms had been complied with. The instrument was signed on each page by the notary public and by the witnesses who were not mere instrumentary witnesses but were witnesses of the fact of the giving of real actual and corporal possession by delivery of the appropriate symbols. A holograph Latin docquet was then added by the notary setting forth his name and authority, attesting that he was present along with the witnesses and saw, knew, heard, and noted the circumstances mentioned in the instrument of sasine, and that he prepared and authenticated the instrument, the number of "leaves" of which it consisted being specified in obedience to statute.[1]

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[1] Bell's Prin., s. 879.

[2] *Gammell* v. *Cathcart*, 1849, 12 D. 19; affd. 1852, 1 Macq. 362.

[3] Ersk. ii. 1, 19.

[4] Vol. iii. p. 243; Bell, Convey. 650. For a discussion of methods of conveyance prior to the sixteenth century, see Ross, Lect. ii. 178.

[5] Duff, 101.

[6] Ersk. ii. 3, 34.

398. There were no *verba signata* for the precept on which sasine might proceed or for the instrument itself, but any errors or defects in the instrument of sasine or in the notary's docquet might well be fatal to the validity of the sasine.[2] The expeding of an instrument of sasine came to be recognised as the only admissible evidence of the constitution of a real right, and the maxim *nulla sasina nulla terra* was literally accurate (under the exceptions above noted).[3] There was at first, however, no publication of the existence of a real right other than the symbolical delivery in presence of witnesses. Evils arose which are thus referred to in the Statute 1540, c. 105. "For eschewing of inconvenientes that oft and diverse times happenis in this Realm, of the new invested crafte and falsed committed and done dailie be them that sellis their landes, or disponis the samin, *ex titulo oneroso*, that puttis their Bairnes or uther friend, and person in the state of the samin, before the daite of the selling or giving thereof to uthers as said is." The particular remedy introduced by that Act was that possession of lands for year and day following on sasine should make the possessor secure against challenge by any other person producing an earlier sasine. But the recording of the instrument in the Register of Sasines within sixty days of its date became a statutory requisite under the Statute 1617, c. 16.[4] Thereafter, until 1845, an instrument of sasine which was not registered within sixty days of its date was null and void.[5]

SUBSECTION (5).—*Entry with Superior.*

399. Where a new feudal estate was being created by an original charter from a superior in favour of a vassal, an instrument of sasine (which after the sasine registers were established required to be recorded within sixty days of its date) following on the charter was sufficient to complete a real right in the vassal. But on the occasion of the transmission of the feu either to heirs or to singular successors of the vassal, the recognition by the superior of a new vassal was necessary before the transmission was complete and the feudal obligations were transferred to the new vassal.[6] That recognition in the case of heirs[7] was contained in a precept from Chancery or a precept of *clare constat* and in the case of disponees [1] in a charter of resignation, or of confirmation, or of adjudication, or of sale, or some combination of these, called charters by progress. A disponee might have a base right before recognition by, or entry with, the superior; but before entry, and while his right was base, the disponee was really in the position of the vassal of the disponer, who remained vested in a mid-superiority. On the disponee obtaining an entry with the superior this mid-superiority was extinguished and the disponee's right became public.[2]

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[1] 1686, c. 17, and A.S., 17th January 1756; Bell, Convey. 648.

[2] *Davidson* v. *M'Leod*, 1827, 2 Ross, L.C. 65.

[3] Craig, ii. 2, 18; Stair, iii. 3, 16; Ersk. ii. 3, 34.

[4] See REGISTRATION.

[5] *Young & Ors.* v. *Gordon's Trs.*, 1847, 9 D. 932.

[6] Bell's Prin., s. 775.

[7] *Ibid.*, s. 776 *et seq.*

SUBSECTION (6).—*Service of Heirs.*

400. Before an heir could demand an entry from the superior he might be required to prove his character as heir by service,[3] which might be either special or general. Special service was only appropriate where the ancestor died last vest and seised in the lands, and it did not vest the lands in the heir. Its effect expired if he should die before completing title.[4] Where the ancestor had any unfeudalised or personal rights of which the heir desired to take advantage, his appropriate course was to obtain a retour of general service. General service connected the heir with the feudal clauses in the titles to the lands and vested in him those heritable rights which could be perfected without sasine and also the right to make use of unexecuted precepts of sasine and procuratories of resignation for the completion of title.[5] Until 1847 a special service implied a general service; [6] but if a special service was not required, only the first three of the usual seven heads of the claim were set forth in the brieve; otherwise the procedure for obtaining general service was the same as for special service.

SUBSECTION (7).—*Precept of Clare Constat.*

401. Service was not an essential step in the completion of the heir's title except where the lands were held of the Crown. When the lands were held of a subject-superior, able and willing to give an entry, such superior might, where the ancestor was entered with him, grant a precept of *clare constat*, containing a precept on which an instrument of sasine might be expede. If the ancestor was base infeft, the superior might grant a combined charter of confirmation (which made the ancestor's title public) and precept of *clare constat*.[7] Where the superior was unwilling or on account of a defect in his title unable to do so, a special service was a necessary preliminary to completion of title.[8] Where the ancestor was not infeft a general service was necessary to enable the heir to make use of the unexecuted procuratories and precepts in the ancestor's titles in virtue of which he could obtain entry either by confirmation or resignation.[1]

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[1] Bell's Prin., s. 783 *et seq.*

[2] See DISPOSITION.

[3] Bell's Prin., s. 779.

[4] *Ibid.*, ss. 1827, 1847.

[5] *Ibid.*, ss. 781, 1848.

[6] *Ibid.*, s. 782.

[7] Bell, Convey. 1096, 1097.

[8] *Ibid.*, 788.

402. In the case of Crown holdings where the ancestor's infeftment was public, special service was a necessary preliminary before the issue of a precept from Chancery on which the heir could obtain infeftment.[2] Where the ancestor was only base infeft, the heir had first to complete title to the mid-superiority remaining in the ancestor's author. A retour of general service was required to complete his right to the unexecuted procuratory of resignation in the ancestor's title. He could then obtain a Crown charter of resignation containing a precept of sasine on which an instrument of sasine was expede and recorded. Thereafter, being infeft in the mid-superiority, the heir required to grant a precept of *clare constat* in favour of himself, containing a precept of sasine on which another instrument of sasine was expede, and this being timeously recorded the heir obtained infeftment in the property. Thereafter it was necessary to consolidate the two fees.[3] If the ancestor's title was unfeudalised the procedure was simpler. Following on a retour of general service the heir had right to use the unexecuted procuratory and precepts in the ancestor's title and could enter either by confirmation or by resignation.[4]

403. The Act of 1693, c. 35, as already mentioned, provided that precepts of sasine should continue to be sufficient warrants for infeftment notwithstanding the death of the granter or grantee, but precepts of *clare constat* were excepted from the provisions of the Act. Prior to the commencement of the Lands Transference Act of 1847 [5] a precept of *clare constat* became ineffectual if infeftment under it had not been taken prior to the death of either the granter or the grantee.

SUBSECTION (8).—*Tinsel of Superiority.*

404. Prior to 1747 where an heir could not obtain an entry owing to the refusal or delay of the superior whose title was complete, he required to obtain from Chancery three consecutive precepts commanding the superior to grant an entry. If these were disregarded demands might be made in the same way against over-superiors until the Crown was reached by whom an entry was never refused. In 1747 [6] a summary remedy was provided under which an heir on production of his retour, or a singular successor on production of a procuratory of resignation, could give a charge to the superior on letters of horning requiring him to give an entry within fifteen days. If casualties were tendered by the vassal the superior was bound to give an entry or to bring a suspension of the charge stating his reasons for declining. It was a sufficient ground for declinature that the title of the last entered vassal had not been produced.[7]

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[1] Bell, Convey. 1095, 1098.

[2] *Ibid.*, 1090.

[3] *Ibid.*, 1092.

[4] *Ibid.*, 1095.

[5] 10 & 11 Vict. c. 48, s. 15; 31 & 32 Vict. c. 101, s. 103.

[6] 20 Geo. II. c. 50, s. 12.

[7] Menzies, 834.

405. If the superior's title was not complete the heir was entitled to charge him to enter within forty days under penalty of forfeiting his right to demand casualties during his lifetime.[1] On the expiry of the *induciæ* without completion of the superior's title the heir could then obtain a decree of tinsel of superiority and thereafter apply to the next overlord for an entry.[2] The new vassal was not, however, thereby relieved of the obligation to pay feu-duties to the superior who had been passed over.[3] The tinsel of the superiority endured only during the life of the vassal by whom it was obtained.[4]

SUBSECTION (9).—*Entry by Resignation.*

406. Where the singular successor of a vassal, duly entered with his superior, desired to enter he could do so either by resignation or by confirmation. Entry by resignation was the logical feudal method.[5] The applicant for entry, in virtue of a mandate given by his author, called the procuratory of resignation,[6] resigned the lands to the superior for favour of new infeftment, and the superior then granted a charter of resignation in favour of the singular successor. At one time there was a symbolical surrender by the disponee's attorney to the superior or to his commissioner specially appointed, in presence of a notary public and two witnesses, by delivery of staff and baton, or in later practice by delivery of a pen, and redelivery thereof to the disponee. This was followed by the expeding of an instrument of resignation *in favorem.* This ceremony and the instrument following on it were obsolete, at least in the case of entries with subject-superiors, long before 1845.[7] Even when the instrument of resignation was expede, the narrative of the symbolical delivery contained in it was in most cases fictitious, and it was held that a charter of resignation could not be validly objected to although no such instrument had been expede.[8] *Fictione juris* the superior was, by the resignation of the vassal, invested with the lands so as to be in a position to dispone them to the resignatory; but the Act of resignation did not divest the resigner until the resignatory had taken infeftment.[9]

407. The charter of resignation was in many respects similar to an original charter and the superior was not entitled to alter the terms of the original grant, unless to the extent warranted by the vassal Following the dispositive clause there was inserted the *quæquidem* clause, named from its first word in the Latin form. This clause contained the deduction of the new vassal's title from his author and a description of the ceremony of resignation, latterly imaginary in most cases. The warrandice clause was so framed that the superior incurred no warrandice beyond that expressed or implied in the original grant. The charter contained a precept of sasine on which the grantee might expede an instrument of sasine and complete title by recording in the Register of Sasines.[1]

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[1] 1474, c. 57.

[2] Bell, Convey. 788; Menzies, 835.

[3] *Wallace* v. *Earl of Eglinton*, 1835, 13 S. 564; *Wallace* v. *Crawford's Exrs.*, 1838, 1 D. 162; *Dickson* v. *Lord Elphinstone*, 1802, Mor. 15024.

[4] *Rossmore's Trs.* v. *Brownlie*, 1877, 5 R. 201.

[5] Bell's Prin., s. 786.

[6] See DISPOSITION.

[7] Menzies, 599.

[8] *Renton* v. *Anstruther*, 1848, 11 D. 37; 2 Ross, L.C. 146.

[9] Ersk. ii. 7, 23; Craig, iii. 1, 17.

408. In connection with entry by resignation it will be well to keep the following points in view:—

(1) A vassal who granted a procuratory of resignation was not divested until his disponee was infeft, and it followed from this that a second resignation in favour of a third party, followed by infeftment, prevented infeftment under a prior charter of resignation,[2] and that the lands fell into non-entry in the event of the death of the last vassal prior to infeftment under a charter of resignation.[3]

(2) A superior, when divested by his vassal's infeftment, could not make a second grant of the subject without being reinvested, *fictione juris*, by the resignation or by the death of the vassal;[4] and the rule was that the terms of a charter of resignation, to be effectual against third parties, had to correspond with those of its warrant.[5]

(3) Unlike a precept of *clare constat*, a precept of sasine in a charter of resignation was assignable, and a superior was not entitled to insist that a grantee of a charter who paid composition for his entry should take infeftment so as to prevent him from assigning the charter to another;[6] but a superior, in granting a charter of resignation to the heir of his vassal in virtue of a procuratory or clause of resignation granted by the vassal, was entitled to insist either on the heir paying composition as a singular successor, or on his taking infeftment on the charter.[7]

(4) Infeftment on a charter of resignation, followed by possession for the prescriptive period, constitutes a valid title to lands, and production of the deed containing the procuratory or clause of resignation is unnecessary after the years of prescriptive possession have run.[8]

(5) Although the delivery of a charter by progress, without reservation, imported a discharge of all prior feu-duties and casualties,[9] yet,

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[1] Jur. Styles, 3rd ed., i. 557.

[2] Bell on Completing Title, 253; *Thomson* v. *Kilgour*, 1628, 1 Br. Sup. 51; *A.* v. *B.*, 1626, Mor. 6889; and cf. *Muir* v. *Muir*, 1588, Mor. 6887.

[3] *Purves* v. *Strachan*, 1677, Mor. 6890; and 2 Ross, L.C. 140.

[4] *Grieve* v. *Williamson*, 1760, Mor. 3022; 2 Ross, L.C. 152; *Marquis of Clydesdale*, v. *Dundonald*, 1726, Mor. 1262; 2 Ross, L.C. 149; and see *Landales* v. *Landale*, 1752, Mor. 14465.

[5] *Cubbison* v. *Cubbison*, 1724, Mor. 10449; 2 Ross, L.C. 156; and *Lord Renton* v. *Feuars of Coldingham*, 1666, 2 Ross, L.C. 155; Mor. 2840.

[6] *Stewart* v. *Burnside*, 1794, Mor. 15027; 2 Ross, L.C. 161.

[7] *Mags. of Musselburgh* v. *Brown*, 1804, Mor. 15038; 2 Ross, L.C. 166; Bell, Convey. ii. 1144; Bell on Completing Title, 257.

[8] *Creditors of Tillicoultry* v. *Murray*, 1701, Mor. 12743; 1617, c. 12; and see 37 & 38 Vict. c. 94, s. 34.

[9] *Cassilis* v. *Bargeny*, 1682, Mor. 6414; *Gibson* v. *Scot*, 1739, Mor. 6500; *Tailors of Glasgow* v. *Blackie*, 1851, 13 D. 1073; and see Lord Kyllachy in *Marshall* v. *Callander and Trossachs Hydropathic Co. Ltd.*, 1895, 22 R. 954; affd. 23 R. (H.L.) 55.

on the principle that such a charter was granted in compliance with a legal obligation on the superior, and *periculo petentis*, it did not debar the granter of it from the benefit of inhibition used by him, prior to granting it, against the granter of the disposition on which it proceeded,[1] nor from vindicating a right to the property afterwards emerging to him.[2]

(6) To enable a superior to grant valid charters and writs by progress, his title to the *dominium directum* had to be complete; but if a proprietor of the *dominium directum* whilst he was not infeft granted charters by progress, and afterwards completed a title, the charters were validated *accretione*;[3] and the result was the same even if the granter of the charters had had, at the time of granting them, no right or title to the superiority, but afterwards acquired and completed a title to it.[4]

(7) A vassal could not refuse to enter on the ground of an alleged defect in the superior's title, where the title was *ex facie* valid and there was no competition for the right of superiority.[5]

SUBSECTION (10).—*Base and Public Infeftment.*

409. As, until 1747, a superior could not be forced to grant a charter of resignation, this method of entry was rarely adopted, excepting in entry with the Crown which never refused a charter. But in that year a summary method of forcing superiors to grant entry by resignation was provided.[6] Notwithstanding that a superior could not be forced to grant a charter of resignation to singular successors, it had become usual to grant one on payment of a fine.[7] By an Act of Alexander II.[8] power was given to the Sheriff to sell a debtor's lands, the purchaser to hold of the Crown or subject-superior in the same manner as the debtor had done, the superior, however, having a right of pre-emption. An Act of 1469 (c. 3) introduced apprisings, and provided that the over-lord (superior) should receive the appriser as tenant (vassal) on payment of a year's rent; the Act of 1672 (c. 19) placed adjudgers in the same position, and that of 1681 (c. 17) extended the right to purchasers at judicial sales.

410. These enactments did not, however, apply to the ordinary purchaser, who, while his right remained unrecognised by the superior, was exposed to the risk of a second conveyance by the seller and other contingencies. With a view to the purchaser's safety, the practice was introduced of having two separate dispositions, or charters, by a seller to a purchaser, one with a holding *a me de superiore meo* and the other with a *de me* holding, the latter being intended merely as a temporary title. On these an indefinite sasine was expede, which, when ascribed to the *de me* conveyance, gave the disponee a valid title to the *dominium utile*, holding of the disponer as superior, and the right of property was thus safe. When the right was afterwards recognised by the superior by confirmation, the *de me* charter was dropped out of the progress. Had both rights been completed separately, there would have been two estates, one of property and another of superiority, requiring consolidation. After a time (about the year 1600) only one conveyance came to be granted, containing an obligation to infeft *a me de superiore meo vel de me*, or, as it was subsequently expressed, *a me vel de me*. Infeftment was taken on the indefinite precept of sasine in like manner, and this constituted a valid base right in the person of the disponee as from the date of the infeftment. When confirmation was obtained, the right was rendered public and equivalent to an infeftment on a precept granted by the superior himself. An alternative holding was not a contravention of a prohibition against subinfeudation.[1] Such a holding was, however, sometimes expressly prohibited by the feu-right.

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[1] *Lord Forbes* v. *Garrioch*, 1673, Mor. 6517.

[2] Bell, Convey. ii. 740.

[3] *Innes* v. *Gordon*, 1844, 7 D. 141; and cf. *Norton* v. *Anderson*, 6th July 1813, F.C.

[4] *Swans* v. *Western Bank*, 1866, 4 M. 663. See ACCRETION, vol. i. p. 47.

[5] *Gibson Craig* v. *Cochran*, 1838, 16 S. 1332; affd. 1841, 2 Rob. 446; 2 Ross, L.C. 329; cf. *Earl of Breadalbane* v. *Macdougall*, 1880, 8 R. 42; affd. 1881, 8 R. (H.L.) 92.

[6] 20 Geo. II. c. 50, s. 12.

[7] See SUPERIOR AND VASSAL.

[8] Cap. 24.

SUBSECTION (11).—*Entry by Confirmation.*

411. The most recent purpose of the charter of confirmation was to dissolve the relation of the vassal to his superior, and to recognise the new vassal in his place. Its original purpose, however, was that sovereigns, barons, and prelates might ratify the grants of their predecessors. It was also used to express the superior's consent to subinfeudation, so as to prevent forfeiture of the rights of sub-vassals on the forfeiture of the original grant. The charter was of very ancient origin, and a form is given in the Styles of Marculfus (*circa*, 660 A.D.). Examples of it in Scots Conveyancing, applied to its original purpose, will be found in the registers of religious houses (*e.g.* Confirmation Charter of David I. to Abbey of Dunfermline, 1127–9, Reg. de Dunf. pp. 3–4).

412. The form of the charter of confirmation in use prior to the Infeftment Act, 1845, for the recognition of a new vassal, often contained these parts: (1) narrative clause; (2) clause of confirmation; (3) clause declaring confirmation to be as valid as if writs confirmed had been engrossed *verbatim*, or as if the confirmation had been made and granted before the taking of infeftment, and containing dispensation with all defects of the confirmation; (4) the *tenendas*; (5) the *reddendo*; (6) the clause known as *salvo jure cujuslibet* ("reserving always my" —*i.e.* the superior's—"own right, and the right of all others, as accords of law"); (7) clause of registration for preservation; and (8) testing clause.[2] The operative clause was the confirming clause, which, with the testing clause, and nothing else, would have given the deed full efficacy. The confirming clause either confirmed the lands and the transmissions and relative infeftments subsequent to the last public infeftment; or, without confirming the lands specially, confirmed the transmissions and relative infeftments, in which case the description of the lands was introduced by way of narrative.[1] Finical objections to the terms in which a deed was identified in a charter of confirmation were disregarded.[2] Confirmation in general terms of all writs was in one case held effectual, the argument that the charter of confirmation required to specify the deeds confirmed being repelled.[3] At one time it appears to have been common to confirm the disposition, together with the precept of sasine therein insert, and instrument of sasine following or to follow thereupon.[4] Probably confirmation of a disposition prior to infeftment would have been effectual,[5] but confirmation before infeftment was unknown in practice even in Mr. Duff's time.

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[1] *Colquhoun* v. *Walker*, 1867, 5 M. 773.

[2] See Jur. Styles, 3rd ed., i. 561; Duff, 212.

413. Confirmation of an infeftment *de me* protected the sub-vassal from the forfeiture of his feu on his immediate superior incurring the casualty of recognition or other forfeiture of his right, but it did not raise the sub-vassal into the position of vassal. Confirmation of an infeftment *a me*, on the other hand, completely divested the former vassal; operated, in the absence of reservation, a discharge of all bygone casualties and duties;[6] and invested the disponee in the full right and place of a vassal, with his obligations. The confirmation, assuming that there was no mid-impediment, operated *retro*, so that the infeftments confirmed were rendered as effectual from their date as if they had proceeded on the superior's precept, and that although a person whose infeftment was confirmed had died before the confirmation.[7] The *de me* holding was completely evacuated. A mid-impediment, however, prevented confirmation so operating. Thus, if two persons onerously and in good faith acquired the same lands, the one who first obtained infeftment, assuming that subinfeudation was not prohibited, was preferable as regards the property, and held the same (*de me*) of the disponer; but as regards the right held of the disponer's superior (*a me*), the infeftment first confirmed, although last in date, was preferable to the other.[8] In these circumstances the first confirmed infeftment operated as an impediment to the confirmation of the second.[9] No mid-impediment was, however, created by the mere infeftment until the superior intervened. Nor was a mid-impediment created by the superior granting a precept of *clare constat* in favour of the heir of the disponer. The heir was *eadem persona cum defuncto*; and the disponee could at any time supersede him, as he could the ancestor. The precept of *clare constat* could only take up the superiority left in the ancestor, and that right had been evacuated by the confirmation of the disponee's infeftment.[1] If, however, the holding was *a me* only, an infeftment carried nothing until confirmed, and, in case of double conveyances, both containing *a me* holdings, the infeftment first confirmed carried the *plenum dominium.*[2] An infeftment *a me* unconfirmed, which was carried by a general service, could be renounced, and the renunciation operated as a mid-impediment to a subsequent confirmation thereof.[3] In competition of rights completed by confirmation, the preference depended, in the case of Crown holdings previous to 1858, on the date of sealing, and subsequently on the date of the charter; and in holdings of subject-superiors, on the date of delivery of the charter, subject to the provision of the Titles Act of 1860 after referred to.

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[1] Jur. Styles, 3rd ed., i. 563.

[2] *Adam* v. *Drummond*, 12th June 1810, F.C.

[3] *Drummond* v. *Drummond*, 1793, Mor. 6936; affd. 1797, 3 Pat. 557.

[4] Duff, 219.

[5] Bell, Convey. ii. 734.

[6] *Tailors of Glasgow* v. *Blackie*, 1851, 13 D. 1073.

[7] *M'Dowall & Houston* v. *Hamilton*, 1793, Mor. 8807; *Lockhart* v. *Ferrier*, 1837, 16 S. 76.

[8] 1578, c. 66; Ersk. ii. 7, 14.

[9] *Gardner* v. *Scott*, 1839, 2 D. 185; revd. 1843, 2 Bell's App. 129.

414. Entry by resignation was more in accordance with feudal rules than transference by confirmation, but the latter became the more common in practice. Nor is the reason for this difficult to find. For not only did base infeftment in virtue of an *a me vel de me* holding at once give a real right to the property, but the superior's right to exact an untaxed casualty on the entry of a singular successor might be postponed by a singular successor who simply took base infeftment. Such a singular successor, so infeft, could, on the death of the last entered vassal, arrange with his heir to make up a title to the mid-superiority created in his ancestor's person by a base infeftment, the heir on entry being liable, in the absence of anything to the contrary in the feu-right, in payment of relief duty only. The heir was not bound to enter into any such arrangement with a disponee of his ancestor; but if he was willing to do so, the superior could not legally object, although such an arrangement as to the mid-superiority might result in his obtaining payment of nothing but relief duty, in circumstances in which, apart from the arrangement, he would have been able to exact payment of composition.

415. Mention may also be made of a form of charter of confirmation which has for a very long time been obsolete. In the earlier history of our land-rights, sub-vassals sometimes obtained a document called a charter of confirmation from their mediate superiors, not in order that they might hold directly of these mediate superiors, but that, if the right to the lands in their own immediate superior was forfeited on account of his death or any delinquency on his part, their subaltern rights might not be involved in the forfeiture.[4]

SUBSECTION (12).—*Combined Charters.*

416. The combined charter of resignation and confirmation was necessary when the disponer granting a disposition with a procuratory of resignation was not an entered vassal. Thus, if A., an entered vassal, disponed to B., who, after base infeftment, disponed to C., who, after base infeftment, disponed to D., and the dispositions in favour of B., C., and D. contained an obligation to infeft *a me vel de me*, procuratory of resignation and precept of sasine, the procuratory of resignation in D.'s disposition was not a sufficient warrant for a simple charter of resignation; for resignation was competent only by a vassal in the hands of his own immediate superior, and C., D.'s author, being in the case supposed only base infeft, was not the vassal of the superior of the lands, *i.e.* of the superior of whom A. held. D., in entering by resignation, obtained a charter of resignation and confirmation, which contained not only the clauses contained in the charter of resignation, but, over and above these clauses, a confirming clause, which was usually inserted before the clause of consent to registration. The *quæquidem* clause in the charter of resignation and confirmation set forth that the lands formerly belonged to the disponer of the disponee seeking entry—*i.e.* to C., in the case supposed—and were holden by him, in virtue of the confirmation thereinafter contained, immediately of the granter of the charter as superior, and had been resigned by him into the hands of the granter of the charter by virtue of a procuratory of resignation contained in a disposition of the lands granted by him in favour of the disponee who was entering by resignation; and the confirming clause confirmed the transmissions and infeftments thereon subsequent to the last public infeftment up to but excluding the disposition in favour of the disponee seeking entry, *i.e.* in the case supposed the dispositions and sasines in favour of B. and C.

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[1] *Fullarton* v. *Hamilton*, 1833, 12 S. 117.

[2] *Rowand* v. *Campbells*, 1824, 3 S. 196; 2 Ross, L.C. 16; 1827, 5 S. 903; affd. 1830, 4 W. & S. 177.

[3] *Douglas* v. *Somerville*, 1713, 2 Ross, L.C. 135.

[4] Menzies, 603; Bell, Convey. ii. 736.

SUBSECTION (13).—*Burgage Tenure.*

417. In the case of property held on burgage tenure the general principles of completion of title were similar, but until 1874 there were specialities in procedure and in the form of writs, as to which see BURGAGE.

SECTION 3.—INFEFTMENT.

SUBSECTION (1).—*Instruments of Sasine.*

418. As has been seen above, an instrument of sasine, as evidencing in solemn manner the symbolical delivery of heritable subjects to a person who had acquired right to them, became necessary for such person's infeftment; and after the institution of the Registers of Sasines the instrument required to be recorded within sixty days of its date in the appropriate register before the grantee obtained infeftment.[1]

419. The changes in the manner of infeftment introduced by the Infeftment Act of 1845 [2] were far-reaching. An instrument of sasine was still necessary as a warrant of infeftment, and the same warrants for sasine were necessary as before the Act.[1] But the instrument of sasine ceased to be the record of ceremonial delivery and only the recording of the new form of instrument in the appropriate Register of Sasines was necessary to give infeftment. The precept of sasine contained in Schedule A. to the Act authorised any notary public to whom the conveyance containing the precept might be produced to give sasine, and the appearance of the bailie of the granter of the conveyance was unnecessary.[2] As the new instrument did not narrate a ceremony it contained no date and could be recorded at any time within the lifetime of the person in whose favour it was expede. The date of registration was the date of the instrument.[3] The 1845 Act made no difference as to warrants of sasine. These continued to be a precept of sasine granted by a person himself infeft together with writs connecting the person seeking infeftment with that precept by means of assignations.

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[1] See REGISTRATION.

[2] 8 & 9 Vict. c. 35.

420. Symbolical delivery in the case of burgage property was not abolished by the Infeftment Act, nor was the form of instruments of sasine in such property altered. This followed in 1847.[4] But the 1845 Act made the addition of a notarial docquet to an instrument relating to burgage subjects unnecessary, and provided that the delivery of symbols might lawfully be given, either on the ground of the subjects as formerly, or within the Council Chamber of the burgh, by delivery of a pen.[5]

SUBSECTION (2).—*Direct Registration.*

421. The Statute 1617, c. 16, by which the Registers of Sasines were established, provided for the registration of "all reversions, regresses, bands, and writs for making of reversions or regresses, assignations thereto, discharges of the same, renunciations of wadsets, and grants of redemption, and siklike all instruments of seasing."[6] Originally various documents constituting securities or reversionary rights were recorded direct in the registers, but by later practice only instruments of sasine were so recorded. This had the advantage of preserving regularity in the form of the register and of providing not only that infeftment should be taken in a definite way, but that the register was not cumbered with the contents of deeds which did not relate to matters of heritable right, as for example clauses in a contract of marriage, which in addition to conveying heritage to heirs of the marriage contained other clauses regulating the obligations of the spouses.

422. The report on conveyancing of the Commission appointed in 1837 for inquiring into the Courts of Law in Scotland discussed whether it was possible to dispense with instruments of sasine altogether (as would have been logical when they ceased to be evidence of a ceremony), and whether the warrant of sasine might not be recorded directly in the register so as to give infeftment. But the weightiest recommendations were against this course as likely to interfere with the uniformity of the register. It was further anticipated that difficulties might arise where the person taking infeftment was not the original grantee of a precept of sasine, but had obtained right to the precept by one or more assignations. These objections were not felt to be so strong in the case of temporary rights in security, and it was suggested that writs relating to such might be recorded direct in the sasine register without the necessity of expeding an instrument of sasine.

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[1] Sec. 2.
[2] Sec. 5.
[3] Sec. 4.
[4] 10 & 11 Vict. c. 49.
[5] 8 & 9 Vict. c. 35, s. 7.
[6] See REGISTRATION.

423. The Lands Clauses (Scotland) Act, 1845,[1] however, did provide for the direct registration of titles to lands acquired under the provisions of that Act. A statutory form for "feus and conveyances" of such lands was provided, "which feus and conveyances being duly executed, and being registered in the Particular Register of Sasines kept for the county, burgh, or district in which the lands are locally situated, or in the General Register of Sasines for Scotland kept at Edinburgh, within sixty days from the last date thereof, which the respective keepers of the said registers are hereby authorised and required to do, shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking and their successors and assigns to the premises therein described any law or practice to the contrary notwithstanding." The anomaly of this procedure was emphasised by the proviso with which the section concluded, viz.: "Provided always that it shall not be necessary for the promoters of the undertaking to record in any Register of Sasines any feus or conveyances in their favour, which shall contain a procuratory of resignation or precept of sasine, or which may be completed by infeftment; and the title of the company under such last-mentioned feus or conveyances shall be regulated by the ordinary law of Scotland, until the said feus or conveyances, or the instruments of sasine thereon, shall have been recorded in a Register of Sasines."

424. The Transmission of Heritable Securities Act of 1845,[2] following the recommendations of the Royal Commission, provided that, when a heritable security had been constituted by infeftment, the right of the creditor might be transferred by assignation or conveyance in scheduled form, and that, on such assignation or conveyance being recorded in the appropriate Register of Sasines, the security "shall be transferred to the assignee as effectually as if such heritable security had been disponed and assigned, and the disposition and assignation or conveyance had been followed by sasine duly recorded."

425. The next step was taken by the Heritable Securities Act of 1847,[3] which provided for the direct registration of bonds and dispositions in security or other writs constituting heritable securities. A statutory form for security writs was scheduled to the Act. This form contained a clause of consent to registration in a Register of Sasines, and it was provided that the registration of such a deed in the appropriate

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[1] 8 Vict. c. 19, s. 80.

[2] 8 & 9 Vict. c. 31, s. 1.

[3] 10 & 11 Vict. c. 50, s. 1.

Register of Sasines "shall be as effectual and operative to all intents and purposes as if sasine . . . had been duly made, accepted and given therein in favour of the original creditor, and an instrument of sasine . . . had been duly recorded of the date of the registration of the said bond and disposition in security as aforesaid."

426. The Registration of Leases (Scotland) Act, 1857,[1] authorised the recording of certain long leases and writs relating thereto. The Titles to Land Act of 1858 [2] provided that from and after 1st October of that year instruments of sasine should no longer be necessary, but that it should be competent and sufficient for any person in whose favour a conveyance was granted to record the conveyance itself in the appropriate Register of Sasines. It was expressly provided that the conveyance being presented for registration, with a warrant of registration thereon in statutory form specifying the person or persons on whose behalf it was so presented, and signed by such person or persons or his or their agent, and being so recorded along with such warrant, should have the same legal force and effect in all respects as if the conveyance so recorded had been followed by an instrument of sasine duly expede and recorded at the date of recording such conveyance.

427. The Titles Act of 1860 [3] made instruments of sasine, or of resignation and sasine, unnecessary in the case of lands held by burgage tenure. The existing statutory provisions for the direct recording of conveyances were consolidated by the Act of 1868,[4] which introduced certain modifications in the form of warrant of registration,[5] and made a warrant necessary for all deeds presented for registration.

428. Prior to 1st January 1925 it was a rule, to which there was no proper exception, that there could be no infeftment by direct registration of a conveyance unless the granter of the conveyance was himself infeft. Infeftment could always be obtained by the direct registration of a conveyance granted by a trustee in a sequestration,[6] a liquidator of a company,[7] a tutor, *curator bonis*, or guardian [8] although title had not been completed by the granter of such conveyance, provided the bankrupt, company, or ward, as the case may be, was infeft. The trustee, liquidator, tutor, curator, or guardian is in a position analogous to that of a factor or commissioner, who, if his constituent is infeft in heritage, may validly sign conveyances on his behalf.

429. The Conveyancing Act of 1924 [9] provides that infeftment may be obtained by the direct registration of a conveyance by a person uninfeft who in such conveyance deduces his title in statutory manner from the person last infeft. It is provided that, on such conveyance being recorded in the appropriate Register of Sasines, the title of the grantee shall be in all respects in the same position as if his title were completed as at the date of such recording by notarial instrument duly expede and recorded. The scheme of the enactment is, therefore, to legalise the incorporation in a disposition and assignation by a person uninfeft of a notarial instrument or notice of title in favour of the grantee. It is by the registration of this implied notice of title that the grantee becomes infeft, rather than by the registration of the conveyance in his favour.[1]

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[1] 20 & 21 Vict. c. 26. See LEASES.

[2] 21 & 22 Vict. c. 76, s. 1.

[3] 23 & 24 Vict. c. 143, s. 3. See BURGAGE.

[4] 31 & 32 Vict. c. 101.

[5] See *infra*, para 449 *et seq.*

[6] 3 & 4 Geo. V. c. 20, s. 100.

[7] 10 Edw. VII. and 1 Geo. V. c. 23, s. 151.

[8] *Scott*, 1856, 18 D. 624.

[9] 14 & 15 Geo. V. c. 27, s. 3.

430. In the case of any error in the recording of any deed or conveyance it is competent of new to record the deed or conveyance with the original or a new warrant of registration.[2] Another case under which recording of new is possible is provided by the Land Registers Act of 1868.[3] Where a writ relates to lands in more than one county, and on its first registration an omission of a reference to one or more of the counties occurs in the registration warrant, the writ may be recorded of new with a new warrant referring to the omitted counties, or re-registration may be effected by insertion of a memorandum referring to the division of the register in which the writ has already been engrossed.[4]

SUBSECTION (3).—*Clause of Direction.*

431. Infeftment in terms of a clause of direction was first introduced by the Titles Act, 1858, and was continued under the Consolidation Act of 1868.[5] A clause of direction provides a means whereby portions of a deed, such as a marriage contract or family settlement or other composite deed can on the recording of the deed be excluded from the Register of Sasines. A clause of direction may with advantage be inserted in writs which refer to both feudal and burgage subjects, where it is desirable to exclude the burgage subjects from the feudal register and *vice versa.* The clause is inserted immediately before the testing clause. It may run in either of two forms:

> And I direct to be recorded in the Register of Sasines the part of this deed from its commencement to the words   on the
> line of the   page, and also the part (*specify each part in the same way*),

or

> And I direct the whole of this deed to be recorded in the Register of Sasines, with the exception of the part (*or* parts, *as the case may be, specifying the part or parts excepted as above*).

Where such a clause has been inserted, it is optional on the part of the grantee to use it or not as he pleases. The whole deed may be recorded in the usual way, but, if the benefit of the clause is to be taken, a special warrant of registration referring to the clause of direction is required.[6] When such a warrant is endorsed the keeper of the register records (1) the parts directed, (2) the clause of direction itself, (3) the testing clause, and (4) the warrant of registration. In using a clause of direction care must be taken that the direction to record enables everything to be recorded which is necessary to make the deed as it appears in the register complete and self-explanatory. When a deed contains a clause of direction, the statute provides that, in any notarial instrument which may be expede thereon, no part or parts of the deed directed to be recorded shall be omitted from such instrument.

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[1] See *infra*, para 457.

[2] 31 & 32 Vict. c. 101, s. 143.

[3] 31 & 32 Vict. c. 64, s. 5.

[4] See REGISTRATION.

[5] 21 & 22 Vict. c. 76, s. 3; 31 & 32 Vict. c. 101, s. 12.

[6] See *infra*, paras. 453 and 457.

SUBSECTION (4).—*Notarial Instruments and Notices of Title.*

432. As previously mentioned, there were two main obstacles in the way of the introduction of the direct recording of conveyances:[1] (1) the difficulty of devising means whereby the register should be kept uniform as a register of heritable rights; and (2) the difficulty of completion of title of a person deriving right from a person uninfeft. The clause of direction afforded one means of overcoming the first obstacle, but in practice little advantage was taken of that method. The introduction of notarial instruments, however, overcame both difficulties as efficiently as did the old instrument of sasine.

433. The old instrument of sasine was a written attestation under the hand of a notary public that the ceremony of symbolical delivery had been duly carried through in his presence and in the manner recited by him. But under the Infeftment Act of 1845[2] the instrument became more than a narrative; for the notary public in pursuance of a precept of sasine gave sasine to the person in whose favour the instrument was expede. The Lands Clauses (Scotland) Act[3] of the same year provided that where the promoters of an undertaking acquired lands compulsorily, they should be entitled, if they should think fit, to expede an instrument under the hands of a notary public containing a description of the lands, and such instrument, being registered in the Register of Sasines in the manner provided by the Act with regard to conveyances of lands, was declared to have the same effect as a conveyance so registered. No form for such an instrument was provided.[4]

434. The Transmission of Heritable Securities Act, 1845,[5] which authorised the direct recording of deeds transmitting heritable securities, also introduced notarial instruments to meet the two difficulties above referred to. It provided that where an assignation or conveyance of a heritable security in the form introduced by the Act was contained in a deed for further purposes and objects, or conveying other properties, such as a marriage contract, deed of trust, or settlement, it was not necessary to record the whole of such deed, but was sufficient to expede and put upon record a notarial instrument setting forth generally the nature of the deed of conveyance, and containing at length the part of such deed relating to and conveying the security in question. It also provided[6] that the heir or general disponee of any creditor infeft in a heritable security might complete his title without the intervention of the superior by expeding a notarial instrument in statutory form.[1]

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[1] *Supra*, para. 422.

[2] 8 & 9 Vict. c. 35.

[3] 8 Vict. c. 19, s. 76.

[4] See *infra*, para. 565.

[5] 8 & 9 Vict. c. 31, s. 1.

[6] *Ibid.*, s. 4.

435. The notarial instruments introduced with regard to heritable securities proved to be so convenient and satisfactory that their use was extended to long leases by the Registration of Leases (Scotland) Act, 1857,[2] and by the Titles Act of 1858,[3] to the case of titles to land not held by burgage tenure. That statute, having authorised the direct registration of conveyances, provided four forms of instrument for completion of title: (1) under a deed for further purposes where it was not desired to record the whole deed; [4] (2) under a general disposition; [5] (3) under an assignation of an unrecorded conveyance; [6] and (4) of a trustee in a sequestration or a liquidator of a company.[7] Similar facilities with regard to burgage lands were provided by the Titles Act of 1860.[8] The Consolidation Act of 1868 [9] repealed all the statutory forms of notarial instrument except those provided by the Registration of Leases (Scotland) Act, 1857, and scheduled in their place nine forms of notarial instruments to meet a variety of cases.[10] The Conveyancing (Scotland) Act, 1874,[11] added a further form of instrument in favour of a general disponee or his assignee in right of a heritable security.

436. A notarial instrument as a means of completion of title is in effect simply a recorded inventory or abstract of the titles under which the person expeding it seeks to establish his claim to a certain estate in or connected with lands or other heritable rights. "A notarial instrument does not in any sense operate as a conveyance, or service or other legal method of transmitting lands. The instrument in itself is no more than a statement of the titles which confer the right, and on being recorded it will operate as an infeftment." [12] But in the case cited a majority of the Court gave a greater effect than this to notarial instruments, and held that the title of a trustee for creditors, duly nominated, in whose favour there had been no conveyance, had been validly completed by the recording of a notarial instrument in his favour.

437. The forms of instrument provided by the Acts of 1868 and 1874 are still appropriate for completion of title, but shorter and more convenient means are provided by the notice of title introduced by the Conveyancing (Scotland) Act, 1924.[1] There are two main differences between notarial instruments and notices of title. The former requires to be expede on behalf of the person completing title by a notary public and is a record of facts and documents brought to the notice of the notary public; the latter may be expede either by a notary public or by a law agent and is, as its name implies, a notice that the person on whose behalf the notice is expede has certain rights.

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[1] 8 & 9 Vict. c. 31, Schedule No. 3.

[2] 20 & 21 Vict. c. 26. See LEASES.

[3] 21 & 22 Vict. c. 76.

[4] Schedule B.

[5] Schedule H.

[6] Schedule K.

[7] Schedule M.

[8] 23 & 24 Vict. c. 143.

[9] 31 & 32 Vict. c. 101.

[10] Schedule J, disponee under deed for further purposes or his assignee. Schedule L, general disponee or his assignee. Schedule N, assignee of unrecorded conveyance. Schedule O, trustee in sequestration or liquidator of a company. Schedule HH, assignee of heritable security following on a deed for further purposes. Schedule JJ, executors dative or heir of creditor infeft in heritable security. Schedule KK, executors nominate or disponee *mortis causa* of creditor infeft in heritable security. Schedule LL, trustee in sequestration or liquidator in right of a heritable security. Schedule MM, executors of creditor under an unrecorded heritable security or assignation thereof.

[11] 37 & 38 Vict. c. 94, Schedule N.

[12] *Kerr's Tr.* v. *Yeaman's Tr.*, 1888, 15 R. 520, per Lord Rutherfurd Clark.

438. From the preceding paragraphs it will be seen that notarial instruments provided means: (1) to obviate the importing into the Register of Sasines (*a*) irrelevant matter contained in the mandate for infeftment, or (*b*) writs which merely transmit a mandate; (2) to connect *ex facie* of the register a general mandate with a particular property; (3) to identify the person in right of a mandate for infeftment, who is ascertainable from the writs, but is not described by name and designation. The correct practice where an instrument is expede is to describe the property to which it relates exactly as in the deeds produced to the notary public as the warrants, for the notary simply attests what has been brought before him. The conveyancer is directed in Schedule L of the Consolidation Act of 1868 "to describe the lands . . . as the same are described in the said disposition," and in Schedule HH of that Act and in Schedule N of the 1874 Act, to "insert the disposition of the lands in security with the description of them all as set forth at full length or by reference in the bond and disposition in security." The sections of the Acts of 1868 and 1874 relating to descriptions by reference [2] are, however, expressed in such wide terms that the use of a description by reference in a notarial instrument is probably permissible even where the warrant for the instrument contains a particular description.

439. Where a notice of title is used in place of an instrument there is no necessity to adhere to the description contained in the warrants on which the notice proceeds. The notice is not an attestation of facts brought before a notary, but a statement that the person on whose behalf the notice is expede has certain rights. It is, therefore, permissible to vary the description of lands contained in the warrants for the notice by expressing it in modern form, or by substituting a description by reference for a particular description. The language employed in the notice, however, should make it possible to identify the subjects described therein with the subjects described in the prior titles. If part of the property has been alienated after the date of the last infeftment in the property to which title is being completed, this ought to be made to appear on the face of the instrument or notice by the introduction of explanatory words. It is not, however, necessary, and may not be possible, to produce as a warrant the deed of alienation of such part.

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[1] 14 & 15 Geo. V. c. 27, Schedule B (1), (2), and (3).

[2] 31 & 32 Vict. c. 101, s. 11; 37 & 38 Vict. c. 94, s. 61.

440. An instrument or notice [1] has no legal effect until it is recorded. The date of registration is its only date. If not recorded in the lifetime of the person on whose behalf it is expede, it can never be recorded or used to any effect in the progress of titles; it thereby becomes as if it had never been.[2] It shares this peculiarity with writs of *clare constat.*[3]

441. The person claiming the title is entitled to have a notarial instrument or notice of title expede on production of what he considers to be his warrants. The instrument or notice does not cure any defects in the warrants on which it proceeds. If these or any of them are defective or are reduced, the instrument or notice is null. The person completing title by means of an instrument or notice of title does so *suo periculo.* For example, if he is founding on a will which he maintains is holograph, he is not prevented from having his title or alleged title put upon record by an instrument or notice until he produces evidence that the will is in fact holograph. If that were so, it would be necessary to go further, and prove also that the will fell to be judged of under the law of Scotland, or at least not under the law of a country which gave no effect to holograph wills. Many cases similar in principle may be figured, *e.g.* questions as to the identity of the testator with the person named in what is represented to be the testator's infeftment, the testamentary capacity of the testator, the identity of the person desiring to expede the instrument with the legatee named in the will, the identity of the property, the fulfilment of conditions affecting the right. It is obvious that all these matters must be ultimately established, if challenged, in order to vindicate the right. But to do so before the notary or person expeding the instrument or notice is out of place. It is unnecessary as regards the title and insufficient as regards the right.

442. The Consolidation Act of 1868,[4] re-enacting earlier provisions of the Titles to Land Acts of 1858 and 1860, provided that where any real burden or condition is appointed to be inserted or referred to in the instruments of sasine or other instruments applicable to any lands, such real burden or condition shall be inserted or referred to in every notarial instrument, insertion by reference to a prior recorded deed being expressly authorised. The Conveyancing Act of 1924 [1] provides that a notice of title expede in terms of the Act shall be equivalent to a notarial instrument, and enacts that the above provisions of the 1868 Act shall apply to such notice. As with the description of the property so with the specification of burdens in a notarial instrument, the words of the warrants produced to the notary public should be followed. Where the instrument is in the form of Schedules J or HH to the 1868 Act, this is expressly required by the directions contained in the schedules. There is, however, no such express direction in the other statutory forms of instruments and, looking to the provision of s. 32 of the 1874 Act,[1] no valid objection could be taken to a notarial instrument or notice of title on the ground that the reference to burdens therein was not in the identical terms contained in the warrants therefor, provided that they are duly referred to in terms of the statute. If any of the warrants for the instrument or notice impose burdens or conditions which have not yet entered the sasine register, but which it is proper should be constituted as real burdens, it is necessary to insert such burdens at full length in the instrument or notice, specifying and identifying the writ by which they are imposed.[2]

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[1] 14 & 15 Geo. V. c. 27, s. 6.

[2] See *supra*, para. 397, with regard to instruments of sasine which were superseded by notarial instruments.

[3] *Supra*, para. 402.

[4] 31 & 32 Vict. c. 101, s. 10.

443. Notwithstanding that a conveyance contains a clause of direction it may be used as a warrant for an instrument or notice, but where such instrument or notice is expede, no part or parts of the conveyance directed to be recorded may be omitted from the instrument or notice.[3] A clause of direction is therefore sometimes used as a means of ensuring that real burdens constituted by a conveyance shall enter the sasine register, by including the clauses imposing the burdens amongst those directed to be recorded.

444. No challenge of any instrument or notice may receive effect, either by reduction or exception, on the ground that any part of the instrument or notice is written on an erasure, unless it is averred and proved that the erasure was made for the purpose of fraud, or that the record thereof in the sasine register is not conformable to the instrument or notice as presented for registration.[4]

445. In the case of any error or defect in any instrument or notice recorded or to be recorded in the Register of Sasines, or in any warrant of registration thereon, it is competent of new to make and record such instrument or notice.[5]

446. The Act of 1924 [6] provides that a notice of title expede in terms thereof shall be equivalent to a notarial instrument; and, in general, wherever title may be completed by means of a notarial instrument, a notice of title is competent. Cases may arise, however, where an instrument is not only more convenient than a notice, but where the competency of the use of a notice of title may be open to question. As already noted,[7] the Lands Clauses (Scotland) Act, 1845,[8] authorises the title to lands acquired compulsorily to be completed by means of a notarial instrument, and as the whole machinery of that Act is anomalous, the competency of employing a notice of title in place of an instrument as a means of completion of title is doubtful. Another case in which an instrument is competent and a notice may not be so may arise under the following circumstances: A. dies infeft in a recorded heritable security and B., his sole executor-nominate, completes a valid title thereto, but dies intestate before divesting himself. C. is confirmed executor-dative *ad non executa* of A. It is competent for C. to complete title to the heritable security by instrument in the form of Schedule JJ to the 1868 Act, the warrants produced to the notary public being the deed constituting the security, and the various grants of confirmation. The security was last vested in B., and as C. cannot be described as having acquired right from B. it is doubtful whether the statutory form of notice which requires a deduction of title from the person last infeft can be used to complete B.'s title. Other similar cases may arise.

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[1] 37 & 38 Vict. c. 94, s. 32. [2] See *infra*, para. 531. [3] 31 & 32 Vict. c. 101, s. 12.

[4] 6 & 7 Will. IV. c. 33; 31 & 32 Vict. c. 101, s. 144; 14 & 15 Geo. V. c. 27, s. 6.

[5] 31 & 32 Vict. c. 101, s. 143; 14 & 15 Geo. V. c. 27. s. 6.

[6] 14 & 15 Geo. V. c. 27, s. 6. [7] *Supra*, para. 433. [8] 8 Vict. c. 19, s. 76.

447. Where title to an estate of superiority is being completed by notarial instrument or notice of title, it is expedient, but not essential, to set out in the instrument or notice the warrandice clause in the infeftment if that clause contains an exception of feu-rights; for that is usually the only indication of the true nature of the estate.[1]

448. In the case of completion of title by instrument or notice in the persons of testamentary trustees, the testator having had separate estates of superiority and property, which were consolidated during his lifetime by minute of consolidation duly recorded, it would seem that it might be sufficient to produce the superiority title alone to the notary as being, after consolidation, the sole title. If the consolidation has been by prescription, it is clear that this is so. But, on the other hand, if the testator's superiority title was *ex facie* a title to a bare superiority, it cannot be sufficient to produce it alone. The instrument would stamp the trustees' title on the face of it as a title to a superiority and nothing more. In that case there must be produced and set forth (1) the superiority infeftment, (2) the property infeftment, and (3) the minute of consolidation. If the testator's superiority infeftment *ex facie* embraced the lands, it may be that the case is different and that it is sufficient to produce it only, but that is not clear, and it will meet all views and can certainly do no harm to produce and set forth all three writs.

SUBSECTION (5).—*Warrants of Registration.*

449. The Lands Clauses Act[2] and the Heritable Securities Act[3] of 1845, although authorising the direct registration of certain writs, did not prescribe any procedure other than that they should be presented for registration. The Heritable Securities Act of 1847[4] provided a statutory form of bond and disposition in security containing a clause of consent to registration in the appropriate Register of Sasines which was interpreted by the statute as entitling the creditor to register the bond accordingly. The Titles Act of 1858,[5] which authorised the direct recording of conveyances, did not prescribe any clause of consent to registration, but required that a conveyance presented for registration should have warrant of registration thereon in statutory form, specifying the person or persons on whose behalf it was presented, and signed by such person or persons, or his or their agent. Two forms of warrant were scheduled to the Act. The first [1] was applicable to the case where only a conveyance, which might have an assignation endorsed, was registered, and the second [2] to the case where the conveyance was presented for registration along with a separate assignation or notarial instrument. Conveyances with a warrant in the statutory form might be recorded either in the General Register of Sasines at Edinburgh or in the Particular Register for the district where the lands lay, and accordingly the warrant did not specify in which register the conveyance was to be inserted. Similar warrants of registration were scheduled to the Titles Act of 1860 [3] for use in the case of land held by burgage tenure.

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[1] See DISPOSITION.

[2] 8 Vict. c. 19.

[3] 8 & 9 Vict. c. 31.

[4] 10 & 11 Vict. c. 50, s. 1, Schedule A.

[5] 21 & 22 Vict. c. 76, s. 1.

450. The objects for which warrants of registration were introduced were, in the first place, to ensure that the registration should be the act of the person taking infeftment thereby, or of his responsible agent, for infeftment has important legal consequences: and in the second place to enable one of two or more persons with separate interests, such as liferent or fee, or joint interests as *pro indiviso* fiars, to obtain infeftment without at the same time infefting the others.

451. In the case cited below [4] it was held that a warrant of registration was not a valid warrant by which infeftment could be taken where it did not contain (1) the designation of the person on whose behalf the deed was to be registered,[5] nor (2) the designation of the person (not being the disponee) by whom it was signed; and it was observed that when a party desires to take the benefit of a statute allowing a short mode of procedure, instead of the form previously in use (which is not abolished), he must do so exactly in the method prescribed by the statute. In order to obviate difficulties to which the above decision gave rise, the Consolidation Act of 1868 [6] made it incompetent to challenge the validity of any warrants of registration on conveyances prior to 31st December 1868 on the ground that the warrants were disconform to the terms of the schedules to the Titles Acts of 1858 and 1860, provided that the warrants contained the name of the party or parties on whose behalf the warrant was written, and the designation of such party or parties, or referred to the same as given in the conveyance on which the warrants were engrossed and were signed by the party or parties themselves, or by his or their agent or agents either individually or as a partnership; and the Act further provided that the designation "agent" or "agents" without any further designation should be sufficient in the case of all warrants expede under the Acts of 1858 and

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[1] 21 & 22 Vict. c. 76, Schedule A, No. 1.

[2] *Ibid.*, Schedule A, No. 2.

[3] 23 & 24 Vict. c. 143, s. 3, Schedule A, No. 1 and No. 2.

[4] *Johnstone* v. *Pettigrew*, 1865, 3 M. 954.

[5] *Infra*, para. 517.

[6] 31 & 32 Vict. c. 101, s. 145.

1860. The requisites of warrants on deeds recorded after 31st December 1868 are given below.

452. The Land Registers (Scotland) Act, 1868,[1] abolished the Particular Registers of Sasines and provided that in the General Register the writs of each county should be kept separate. It also provided[2] that all writs, and not only conveyances, to be recorded in the General Register, should, previous to being presented for registration, have a warrant endorsed, specifying not only the person or persons on whose behalf the writ was presented, but also the county or counties in which the lands were situated. The forms of warrant authorised by the Act of 1858 were superseded. Three forms of warrant were provided, viz.:

No. 1—Warrant of registration to be written on a conveyance, etc. when presented without assignation apart, or with writ of resignation or other similar writ thereon : No. 2—Warrant of registration to be written on a conveyance, etc. when presented with assignation apart, or notarial instrument ; No. 3—Warrant of registration on a writ to be registered for preservation, or preservation and execution as well as for publication—which method of registration was introduced by the Act.

453. The Consolidation Act of 1868[3] also provided statutory forms for warrants of registration, superseding the forms provided by the Acts of 1858 and 1860. When the Land Registers Act was passed it was doubtful when the Consolidation Act would become law and, owing to the re-arrangement of the sasine registers enacted by the former Act, it was necessary to ensure that appropriate warrants should be authorised even if the passing of the Consolidation Act was delayed. Nos. 1 and 2 of the warrants introduced by the Land Registers Act were superseded by Schedule (H), Nos. 1 and 2 of the Consolidation Act, which were in similar terms but were also applicable in the case of writs to be recorded in the Burgh Register of Sasines. These two Land Registers Act forms were repealed by the Statute Law Revision Act, 1875, but the third form, applicable to the case where a writ was registered for preservation or preservation and execution as well as for publication, remained in force until the commencement of the Conveyancing Act of 1924,[4] which repealed all existing forms of warrant. In Schedule F (No. 2) to the Consolidation Act of 1868 there was provided a form of warrant for use where a deed was to be recorded in terms of a clause of direction contained in it.

454. Where a contract of excambion is to be recorded along with a schedule of debts in terms of the Consolidation Act of 1868,[5] it is appropriate that the warrant of registration should refer to the schedule.

455. The Consolidation Act of 1868[6] required all writs, except certain burgage writs, to have warrants of registration endorsed before being presented for registration, and required that in every case the warrant should specify the person or persons on whose behalf the writ was presented for registration and the register or registers of the county or burgh, as the case might be, in which the lands to which the writ referred were situated. It was also required that the warrant should be signed by such person or persons, or by his or their agent or agents. It was expressly provided that the warrant might be signed either by an individual agent or by the subscription of any firm of which such agent might be a partner. Where the signature was by an agent the schedules to the Consolidation Act, differing from the earlier schedules, did not require the agent to add the name of his client after his professional designation, but indicated that his professional designation must be given. In the case of burgage property it was only conveyances which, under the Titles Act of 1860,[1] required to have a warrant endorsed before being presented for registration, and no alteration in this respect was made by the Consolidation Act of 1868. The Conveyancing Act of 1874,[2] however, which abolished the distinction between burgage and feu, repealed [3] the proviso to s. 141 of the Consolidation Act, and provided that that section should apply to all writings whatsoever which may be recorded in any Register of Sasines.

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[1] 31 & 32 Vict. c. 64, s. 8.

[2] *Ibid.*, s. 4.

[3] 31 & 32 Vict. c. 101, s. 18, Schedule H.

[4] 14 & 15 Geo. V. c. 27, s. 10.

[5] 31 & 32 Vict. c. 101, s. 150.

[6] *Ibid.*, s. 141.

456. The Conveyancing Act of 1924 [4] repealed the statutory forms of warrants provided by the Consolidation Act and the Land Registers Act of 1868 and substituted a new form of warrant which may be adapted for use in every case where a warrant is required. The requisites as to the signature of the warrant are unchanged, but the Act expressly provides that it is only where a writ is to be recorded on behalf of a person not named therein that the designation of such person shall be inserted in the warrant, and that in other cases it shall be sufficient simply to name the person, referring to him as "within named." Further, in order to cure certain irregularities, it is declared not competent to challenge the validity of any warrant on any writ recorded prior to the commencement of the Act [5] on the ground that the person in whose favour such warrant is conceived is not designed therein, or that the nature of his right is not stated therein, if such warrant on being read as part of such writ identifies such person as a person therein named and designed. It is also enacted, with retrospective effect, that where a recorded writ is in favour of two or more persons, or of trustees *ex officio*, and contains a destination to the survivors of such persons, or to the successors of such trustees, all the qualities of the destination shall be presumed to be imported into a warrant of registration in their favour endorsed on such writ, and that it shall not be necessary that such destination be inserted in the warrant. Where the warrant is conceived in favour of a person who has only a limited interest, the nature of such interest should be mentioned in the warrant, though it may not be essential to do so, *e.g.*

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[1] 23 & 24 Vict. c. 143, s. 3.

[2] 37 & 38 Vict. c. 94, s. 25.

[3] *Ibid.*, s. 33.

[4] 14 & 15 Geo. V. c. 27, s. 10, Schedule F.

[5] 1st January 1925.

Register on behalf of the within-named A. in liferent in the register of the county of ,

or

Register on behalf of the within-named A. in liferent and B. in fee, etc.

or

Register on behalf of the within-named A. and B. for their respective rights and interests, etc.

457. The notes to Schedule F make provision for variations in the statutory form of warrant for the following cases:—(*a*)[1] Where the deed is to be recorded in terms of a clause of direction, viz.:

Register in terms of the clause of direction herein contained on behalf of, etc.

(*b*) [2] Where the deed is to be recorded for preservation or preservation as well as for execution, viz.:

Register on behalf of the within-named A. for preservation (*or* for preservation and execution) as well as for publication in the register, etc.

(*c*) [3] Where title is being completed in a fiduciary capacity, viz.:

Register on behalf of the within-named A. and B. as trustees within mentioned in the register, etc.

(*d*) [4] Where a deed is to be recorded along with an assignation, or assignations or a notice of title, viz.:

Register on behalf of the within-named A. in the register, etc. along with the assignation (*or* assignations) endorsed hereon (*or* docqueted with reference hereto).

In all cases the warrant should be written on some part of the deed to which it has reference,[5] although it may be commenced on some part of the deed and completed on an additional sheet. A warrant, however, wholly written on a separate sheet is no mandate for registration.

SUBSECTION (6).—*Sasine ex propriis manibus.*

458. Reference has been made to the early practice of the granter of a feu charter giving sasine by his own hands.[6] Practically the only modern or recent survival of this custom was in the form of infeftment given by a husband to his wife, usually for her liferent after his death in the event of her surviving him. Prior to 1845 such infeftment was usually incorporated in the husband's sasine. The instrument of sasine in such a case contained a statement, after the clause of delivery, that the husband did *ex propriis suis manibus* give liferent sasine by delivery of the appropriate symbols to her or her attorney, whereupon she or her attorney took instruments in the hands of the notary in presence of the witnesses.[1] Where there was an antecedent warrant in favour of the wife the husband did not require to sign the instrument, but where there was no such warrant his signature as well as that of the notary was required. His subscription operated as a disposition in favour of his wife and did not require to be attested.[2]

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[1] Schedule F, note 1.

[2] *Ibid.*, note 2.

[3] *Ibid.*, note 3.

[4] *Ibid.*, notes 4 and 5. See *infra*, para. 535, 538.

[5] 31 & 32 Vict. c. 101, s. 140.

[6] *Supra*, para. 393 ; Bell's Prin., s. 765.

459. This subsidiary infeftment might be grafted on the husband's sasine, whether his title was being made up by confirmation or by resignation, but it is to be observed that even in the latter case the wife would not be entered with the superior. It would have made no difference in this respect whether the superior's charter of resignation was or was not assignable, for the idea of sasine *propriis manibus* was not that it was a qualified transmission of the existing warrant, but, on the contrary, that his warrant was exhausted by his plenary infeftment and then that he, being thus *in titulo*, granted a separate warrant, express or implied, in favour of his wife. Sasine *ex propriis manibus* never enjoyed the immunity from challenge on the ground of erasures conferred on instruments of sasine.[3]

460. As regards burgage property, sasine *ex propriis manibus* was somewhat of a misnomer, inasmuch as the grant contained no precept of sasine, and the sasine was the act, not of the granter, but of the magistrates. What is meant by the expression is, that the resignation of the husband, on which the wife received sasine from the bailie, was made *ex propriis manibus*.

461. The Infeftment Act of 1845 [4] did not apply to infeftment *ex propriis manibus*. That Act directed sasine to be given by a notary, which could not at the same time be *ex propriis manibus* of the granter of the conveyance. It does not, however, appear that there would have been anything incompetent in recording in one instrument the husband's infeftment in the form of the Act of 1845 and the wife's infeftment *ex propriis manibus* of her husband in the old form, though such procedure and instrument would have been inconvenient. When the direct registration of conveyances was authorised by the Titles Act of 1858 [5] no machinery was introduced to adapt the altered procedure to infeftments *ex propriis manibus*; but the Consolidation Act of 1868 [6] provided that where it was desired to give investiture *propriis manibus*, it should be competent for the person in whose favour the conveyance was granted to record the conveyance in the appropriate register with a warrant of registration [7] as follows :—

> Register on behalf of A. B. in the register of the county of C. and also *ex propriis manibus* on behalf of L., wife of the said A. B. in liferent (*or as the case may be*).

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[1] Bell, Convey. 661.

[2] *Kibble* v. *Ross*, 1804, Mor. 14314; and see *Anderson* v. *Anderson*, 1828, 6 S. 463.

[3] 6 & 7 Will. IV. c. 33.

[4] 8 & 9 Vict. c. 35.

[5] 21 & 22 Vict. c. 76.

[6] 31 & 32 Vict. c. 101, s. 15.

[7] *Ibid.*, Schedule H, No. 3.

Such warrant could not be signed by an agent, but only by the person giving infeftment *ex propriis manibus*, *i.e.* by the husband. It was declared that the conveyance recorded along with such a warrant should have the same legal force and effect in all respects as if the conveyance had been followed by an instrument of sasine, or instrument of resignation and sasine *propriis manibus* expede in favour of the wife of such person, and signed by such person, and recorded at the date of recording the conveyance, according to the former law and practice.

462. The procedure of s. 15 of the 1868 Act was little used. It was open to various objections and was made incompetent from and after the commencement of the Conveyancing Act of 1924,[1] *i.e.* 1st January 1925.

Section 4.—Service of Heirs.

Subsection (1).—*Character of Heir.*

463. From the point of view of completion of title heirs may be classified as heirs at law or heirs of line, heirs of provision, heirs of provision and tailzie, and heirs of provision in trust. Formerly heirs of conquest, as opposed to heirs of line, required to complete title as such, but with the disappearance of the difference between conquest and heritage this distinction came to an end.[2] Heirs at law who succeed by devolution of law are said to succeed *provisione legis*; and heirs in any of the other categories who are entitled to succeed in virtue of a special destination contained in the last feudal investiture of the heritage are said to succeed *provisione hominis.*

464. Prior to 1874 the character in which an heir served to his ancestor was of importance, for service in one character did not carry or enable the heir to complete title to rights conceived in favour of heirs of a different character,[3] although the heir might possess both characters,[4] unless the character in which service was obtained necessarily included the other character as well.[5] Where an heir of provision was being served it was proper, though not essential,[6] to refer to the deeds of provision in the claim, and the Service of Heirs Act of 1847 specially required that all petitions for service by heirs of provision should specify such deeds.[7]

465. The reason for this rule was that a party served as heir under a particular deed became liable for all the obligations imposed thereunder, and it would have been unjust to hold him liable for burdens imposed under a deed which he had not adopted by completing title under it.[8] This rule did not apply where heirs completed title by means of a precept of *clare constat* from a subject-superior without expeding service.[9]

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[1] 14 & 15 Geo. V. c. 27, s. 10 (6).
[2] 37 & 38 Vict. c. 94, s. 37.
[3] Bell, Convey. 1099.
[4] *Edgar* v. *Maxwell*, 1738, Mor. 14015; 2 Ross, L.C. 522; *Cathcart* v. *Earl of Cassilis*, 1807, 2 Ross, L.C. 525.
[5] *Earl of Dalhousie* v. *Lady Hawley*, 1712, 2 Ross, L.C. 292.
[6] *Forbes* v. *Maitland*, 1754, Mor. 14431, 2 Ross, L.C. 555; *Hay* v. *Hay*, 1758, Mor. 14369, 2 Ross, L.C. 563; Bell, Convey. 1101.
[7] 10 & 11 Vict. c. 47, s. 4; 31 & 32 Vict. c. 101, s. 29.
[8] Bell, Convey. 1100.
[9] *Ibid.*, 1101.

When heirs ceased to be liable for an ancestor's debts beyond the value of the estate to which they succeeded it became unnecessary,[1] and the Conveyancing Act of 1874 provided that it should be no objection to any precept, writ, or petition by which an heir could complete title, whether dated before or after the commencement of the Act, that the character in which the heir is entitled to succeed is erroneously stated therein, provided such heir was in truth entitled to succeed as heir to the lands specified.[2] Although a decree of general service does not specify any lands, it is thought that the foregoing provision will also apply to the case where the character of an heir is erroneously stated in a decree of general service.

SUBSECTION (2).—*Service of Heirs after* 1847.

466. The Service of Heirs Act of 1847,[3] the provisions of which were re-enacted with modifications by the Consolidation Act of 1868,[4] repealed and rendered incompetent the older procedure by brieve and claim and there was substituted therefor a simpler procedure by petition to a Sheriff. In the case of general service the petition was to the Sheriff of the county in which the ancestor had his domicile, or in the option of the petitioner to the Sheriff of Chancery, the holder of a new office created by the Act.[5] In the case of special service the petition was to the Sheriff of the county where the ancestor's lands lay, or to the Sheriff of Chancery. When the ancestor died vest in lands lying in more than one county, the petition could only be presented to the Sheriff of Chancery.

467. Forms of petition for service were scheduled to the Act,[6] these being superseded by Schedules P and Q to the Act of 1868,[7] P being appropriate to the case of a petition for general service, and Q to a petition for special service. In a petition for general service the heir requires to condescend on:

(1) The date of death of the ancestor to whom service is sought; (2) his domicile at the date of his death, but where the ancestor has died more than ten years previous to the presenting of the petition it is not required to prove the domicile; it is sufficient to state and support by oath, if required by the Court, that the petitioner cannot prove at what place the ancestor had his domicile; and (3) the character in which the heir craves service. In a petition for special service the matters to be condescended on are: (1) the date of death of the ancestor; (2) the fact that he died last vest and seised in lands described, under reference to burdens (if any), to which service is sought, the ancestor's title being specified; and (3) the character in which service is craved. The value of the lands, the *tenendas*, and the *reddendo* no longer require to be condescended on as in the older form of service or brieve of in-

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[1] 37 & 38 Vict. c. 94, s. 12.
[2] *Ibid.*, s. 11.
[3] 10 & 11 Vict. c. 47.
[4] 31 & 32 Vict. c. 101, ss. 27–61.
[5] See BRIEVE, vol. ii. 373; CHANCERY, vol. iii. 194.
[6] 10 & 11 Vict. c. 47, s. 4, Schedules A and B.
[7] 31 & 32 Vict. c. 101, s. 29.

quest. It was also made competent in a petition for special service as heir of line or heir male to add a crave for general service in the same character,[1] in which case after the statement of the character in which the heir claimed service in special there followed a statement that the petitioner was likewise heir in general or heir male in general, as the case might be, of the ancestor. In every petition under which an heir craves service as heir of provision, whether in special or in general, the deed or deeds under which he claims require to be distinctly specified in the petition.[2] This was a new requirement. Under the older law a general service by an heir of provision was valid though it did not specify the particular deed of provision.[3] The petition may be signed by the petitioner or by a specially authorised mandatory, who need not be a law agent but must be an individual, not a firm.

468. The Act of 1868[4] (following the Act of 1847) provides the method of publication of the petition and the *induciæ* before the expiry of which evidence in support may not be taken.[5] In general, the *induciæ* are fifteen days, except (*a*) where the ancestor died abroad, in which case the *induciæ* are thirty days, and (*b*) where publication requires to be made in Orkney and Shetland or the petition is presented to the Sheriff of Orkney and Shetland, in which case the *induciæ* are twenty days. Provision is also made for lodging with any Sheriff-Clerk or with the Sheriff-Clerk of Chancery, a caveat which entitles the person lodging it to notice of the presenting of a petition for service.[6]

469. The Act appoints as commissioners to take evidence [7] in support of the petition the provost or any of the bailies of any city or royal or parliamentary burgh, or any justice of the peace for the United Kingdom, or any notary public, or any commissioner appointed by the Sheriff to whom the petition is presented. In practice, in the usual case, the proof required in support of the petition is an affidavit by two witnesses taken before a justice of the peace or notary public. The first witness depones to the different statements of fact contained in the petition, and the second concurs in general terms.[8]

470. No person may object to a petition for service who could not have competently opposed under the old procedure.[9] In general, it is necessary for an objector to present a competing petition,[10] but that is not an absolute rule.[11] Where there are competing petitions any of the parties, at any time before proof has to be taken, may, by entering a note of appeal, have the process transferred to the Court of Session there to be tried by jury.[12] When the jury has given its verdict the Court remits the cause back to the Sheriff with instructions to pronounce a decree in conformity with the verdict. The Court will consider whether the case is suitable for jury trial, but the appellant has a right to jury trial unless cause is shewn to the contrary.[1] Where a petition is refused by the Sheriff an appeal lies to the Court of Session who may take further evidence.[2] After a decree of service has been pronounced, and infeftment has followed thereon, it may be challenged in an action of reduction, but not by the presenting of a competing petition for special service.[3] If a decree of service is challenged by way of reduction, the Court may allow further evidence to be led, or may direct the cause to be tried by jury.[4] The onus of proof lies on the person suing a reduction of a service; this onus is discharged by proving that the service had proceeded on insufficient evidence, but additional evidence may be adduced by the defender in the action of reduction.[5] Where the Court determines that the person entitled to be served is not the person preferred by the Sheriff, a remit is made to the Sheriff with instructions how to proceed.

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[1] 31 & 32 Vict. c. 101, s. 48.

[2] *Ibid.*, s. 29.

[3] *Forbes* v. *Maitland*, 1754, Mor. 14431; 2 Ross, L.C. 555.

[4] 31 & 32 Vict. c. 101, s. 30.

[5] *Ibid.*, s. 33.

[6] *Ibid.*, s. 31.

[7] *Ibid.*, s. 33.

[8] Jur. Styles, 6th ed., p. 184 *et seq.*

[9] 31 & 32 Vict. c. 101, s. 40.

[10] See *Mackenzie* v. *Catton*, 1870, 8 M. 457.

[11] *Sir A. Moncrieff* v. *Lord Moncreiff*, 1907, 4 F. 1021.

[12] 31 & 32 Vict. c. 101, s. 41.

SUBSECTION (3).—*Liability of an Heir for his Ancestor's Debts.*

471. By our older law an heir completing title to heritable estate incurred universal representation and was liable for his ancestor's debts.[6] The Statute 1695, c. 24, provided that an heir by giving up inventories within year of the ancestor's death or from the birth of a posthumous child, and completing title within forty days thereafter could limit his liability to the value of the estate contained in the inventories.[7] This form of service was referred to as service *cum beneficio inventarii.* A further privilege was conferred on heirs by the provisions of the Service of Heirs Act of 1847,[8] re-enacted in the Consolidation Act of 1868,[9] under which on a petition for general service the heir could annex a specification of lands which the service is to affect. Service of this kind was called "service with specification annexed," and the heir thereby served was liable for his ancestor's debts only to the extent or value of the lands contained in the specification. This enactment was virtually superseded by the Conveyancing Act of 1874,[10] which provided that an heir should not be liable for the debts of his ancestor beyond the value of the estate to which he succeeds.

SUBSECTION (4).—*Effect of Decree of Service.*

(i) *Special Service.*

472. Under the older law [11] service in special did not have the effect of vesting in the heir served the estate contained in the service, and if the heir died without completing title and his successor desired to serve in special, he could only do so by passing over such heir and serving as heir of their common ancestor who was last infeft. Service in general, on the contrary, had the effect of vesting in the heir served any unfeudalised rights which were vested in the ancestor,[1] and service in special implied service in general.[2]

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[1] *Mackintosh* v. *Ross*, 1873, 11 M. 636; 1875, 3 R. 232.

[2] 31 & 32 Vict. c. 101, s. 42.

[3] *Cunningham* v. *Glen*, 1812, 1 Ross, L.C. 395; 2 Ross, L.C. 297.

[4] 31 & 32 Vict. c. 101, s. 43.

[5] *Alexander* v. *Officers of State*, 1868, 6 M. (H.L.) 54.

[6] Bell's Prin., s. 1914 *et seq.*

[7] *Ibid.*, s. 1926.

[8] 10 & 11 Vict. c. 47, s. 25.

[9] 31 & 32 Vict. c. 101, s. 49.

[10] 37 & 38 Vict. c. 94, s. 12.

[11] Bell's Prin., ss. 782, 1833.

473. By the Service of Heirs Act of 1847[3] it was provided that for the purpose of completing the title of the heir served, a decree of special service, being recorded in Chancery and extracted, should be equivalent to a disposition of the lands contained in the service granted in his favour by the ancestor who was infeft; but this enactment was so expressed that if the heir died after service but without completing title no right transmitted to his successors or assignees.[4] But under the Consolidation Act of 1868[5] an extracted decree of special service may be used as a link in title by any person deriving right from the person served as heir. This effect is only given to a decree of special service which has been extracted, and before extract the decree is not a valid warrant for completion of title of the heir or of others deriving right from him.[6]

(ii) *General Service.*

474. General service was necessary to enable an heir to complete title to any personal or unfeudalised rights to land vested in the ancestor, and the old retour of general service vested in the heir the right to use any unexecuted procuratories or precepts in the ancestors' titles.[7] A general service as heir of line will not carry rights conceived in favour of heirs of provision,[8] although both characters may be possessed by the party served, because it is not plain on the face of the service that the person served as heir of line is also heir of provision. But, where one character of heir necessarily includes another character, rights conceived in favour of the latter character will be carried by a service in the former.[9] A general service for taking up a special right conferred by a particular deed is in a different position. This kind of service was sometimes called a general special service and was not invalidated by an inaccuracy in stating the character in which the heir claimed to be served, provided it was clear on the face of the service that the heir served was in fact the heir entitled to succeed.[10]

475. The 1874 Act[11] provides that a decree of general service shall be equivalent to a *mortis causa* general disposition of lands in which the ancestor was infeft in favour of the heir served to the effect of enabling the heir or his assignees to complete title to such lands as general disponees, notwithstanding that the ancestor at the date of his death may have been subject to any legal incapacity. The like effect is given to a decree of general service in favour of the heir of any person so served, or by any of the successive heirs of the investiture, or by the heir of any general disponee. It does not appear to be necessary that a decree of general service should be extracted before it forms a warrant for completion of title.

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[1] Bell's Prin., s. 781.
[2] *Ibid.*, s. 1849.
[3] 10 & 11 Vict. c. 47, s. 21.
[4] *Moreton's Trs.* v. *Moreton*, 1854, 16 D. 1108.
[5] 31 & 32 Vict. c. 101, s. 46.
[6] *Lord Napier and Ettrick's Tr.* v. *de Saumarez*, 1900, 2 F. 882.
[7] Bell's Prin., s. 781; *Livingstone* v. *Napier*, 1765, 2 Ross, L.C. 511.
[8] *Cathcart* v. *Earl of Cassilis*, 1807, 2 Ross, L.C. 525.
[9] *Haldane* v. *Haldane*, 1766, Mor. 14443; 2 Ross, L.C. 564.
[10] *Bell* v. *Carruthers*, 1749, 2 Ross, L.C. 549.
[11] 37 & 38 Vict. c. 94, s. 31.

SUBSECTION (5).—*Declaratory Services.*

476. A person may have a right to land of such a nature that no service or other writ is necessary to vest any further right in him. But, nevertheless, service to some ancestor may be a convenient link in title for the identification of such person.[1] The need for service for declaratory purposes arises where the feudal fee is already vested and there is nothing *in hæreditate jacente* of the ancestor which can be taken up by service in special. Practice, however, allows the use of service in general where there is no right to be transferred, so that the character of the persons served may be established by a decree of Court without the necessity of obtaining a decree in some more formal declaratory action.[2] *E.g.* in the case where a fiduciary fee is vested in a parent, under a destination to him in liferent and to his children in fee, the fee vests in the children at birth, and it is illogical that the children should complete title to the fee by service to the liferenter. But this mode of completion of title has been sanctioned by the Court.[3] So also where there is a disposition by A. to the heirs of B., it appears competent by means of declaratory service to determine who are the heirs of B.,[4] though nothing was ever vested in B. under the disposition from A. Wherever the identity of the person desiring to complete title depends on propinquity to some other person, it would appear to be competent to have the propinquity ascertained by a decree of general service.

477. Questions of title and questions of substantial right and interest are not the same thing,[2] and though the person completing title is an institute and could complete title as a disponee and not as heir of provision, still a decree of general service may be used *in modum probationis* to establish the institute's character. But where there is a destination to the "heirs male of my body, whom failing to A., B., C., and D.," the conditional institutes being designated as individuals and not as members of a class, they, on the death of the disponer without heirs of his body, may complete title as disponees without any service or declarator.[5]

478. A case in which declaratory service has received statutory recognition occurs under the Registration of Leases (Scotland) Act, 1857.[6] The right of a tenant under a registrable lease is not a feudal right, and on the tenant's death the right to the lease vests in the heir without service,[1] but the Act recognises service as a link in the completion of title of the heir of a person vested in a recorded lease.

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[1] Bell's Prin., s. 1837.

[2] *Macdougall*, 1900, 3 F. 99.

[3] *Dundas* v. *Dundas*, 1823, 2 S. 445; *Peacock* v. *Glen*, 1826, 4 S. 742; 2 Ross, L.C. 53.

[4] Bell, Convey. 1108.

[5] *Hutchison* v. *Hutchison*, 1872, 11 M. 229.

[6] 20 & 21 Vict. c. 26, s. 8.

SUBSECTION (6).—*Vesting in Heirs.*

479. Prior to 1st October 1874, on the death of a person possessed of feudal estate, no interest in his succession was transmissible to an heir who did not complete a feudal title, and on the death of such an heir the person entitled to succeed was the one who could claim the character of heir to the person last infeft.[2] Since the commencement of the 1874 Act,[3] however, a personal right to every estate in land descendible to heirs vests in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed. The Act further provides that such personal right shall be of the like nature, and be attended with the like consequences, and be transmissible in the same manner, as a personal right to land under an unfeudalised conveyance. One result of this enactment is that possession by an heir on apparency ceased to be known to the law.[4]

480. The Act also provided machinery for completion of title by a person acquiring right to lands as heir to a person who had merely a personal right to such lands by survivance.[5] Procedure by service in special was only competent where the ancestor was infeft, but the Act introduced an analogous procedure by petition to the Sheriff of Chancery or to the Sheriff of the county where the lands lay, and scheduled the form of such a petition.[6] This form of petition is only appropriate for completion of title "to lands," which includes "all subjects of heritable property," [7] but not to securities and not to an "estate in land," which means "any interest in lands, whether in fee, liferent, or security, and whether beneficial or in trust, or any real burden on land." The procedure cannot therefore be used for completion of title to rights which have never been feudally vested in anyone.[8]

481. The question may arise whether an heir is an institute (who should complete title as a disponee) or a substitute (who should complete title as heir of provision). As to such question, see VESTING IN SUCCESSION.

SUBSECTION (7).—*Services in Trust.*

482. Under a destination contained in a disposition in favour of A., whom failing B., it is competent for A., except in the case where he is subject to some legal incapacity, to evacuate the destination and so defeat B.'s hope of succession. If the succession opens to B., it is necessary for him to establish his character and right as heir of provision by service before he can complete title as such. If, however, the destination is to A., whom failing to B. in trust, it is not open to A. to evacuate the destination to B., and there does not appear to be the same necessity for B. to complete title as heir of provision in trust, as neither his character nor his right are in question. The practice of conveyancers, however, has been to complete B.'s title by service as heir of provision in trust. Where there is a destination to the heir-at-law of a sole or last surviving trustee, the appropriate method of completion of the heir's title is as heir of provision in trust,[1] and by statute [2] the heir-at-law of a sole or last surviving trustee, being of full age and subject to no legal incapacity, can complete title to the trust estate for limited purposes in the same manner as any other heir—that is, by service.[3]

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[1] Bell's Prin., s. 1680.

[2] *Supra*, para. 472.

[3] 37 & 38 Vict. c. 94, s. 9.

[4] *M'Adam* v. *M'Adam*, 1879, 6 R. 1256.

[5] 37 & 38 Vict. c. 94, s. 10.

[6] *Ibid.*, Schedule E.

[7] *Ibid.*, s. 3.

[8] *Baroness Howard de Walden*, 1900, 2 F. 1101.

SECTION 5.—COMPLETION OF TITLE BY HEIRS.

SUBSECTION (1).—*Infeftment Act*, 1845.

483. The general principles of completion of title of heirs have been already discussed, and it was observed that in the case where lands were held of the Crown the heir required first to establish his character by service and thereafter to obtain a precept from Chancery directing the Sheriff of the county where the lands lay to give infeftment to the heir.[4] The Infeftment Act of 1845 [5] simplified the procedure by providing for the insertion of a precept of sasine in the new statutory form, in precepts from Chancery, on which an instrument of sasine could be expede and infeftment obtained by recording before the first term of Whitsunday or Martinmas posterior to the date of the precept. Precepts of *clare constat* from subject-superiors also contained a precept of sasine on which an instrument of sasine could after 1845 be expede at any time within the lifetime of the vassal.

SUBSECTION (2).—*Service of Heirs and Crown Charters Acts of* 1847.

484. The Service of Heirs Act of 1847,[6] besides simplifying forms of service, provided that a decree of special service should contain a precept of sasine on which an instrument of sasine could be expede and recorded at any time during the life of the heir. A precept from Chancery or a precept of *clare constat* was no longer necessary though remaining a competent mode of completing title. Where the ancestor was base infeft in lands held of the Crown, the heir's entry with the Crown was much simplified. By expeding an instrument of sasine on the precept contained in an extract decree of special service, the heir became base infeft and could obtain a Crown charter of confirmation confirming the ancestor's and the heir's sasines and their warrants, or the lands and the heir's sasine.

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[1] *M'Lean*, 1892, 19 R. 1043.

[2] 37 & 38 Vict. c. 94, s. 43.

[3] *Infra*, para. 494.

[4] *Supra*, para. 400.

[5] 8 & 9 Vict. c. 35.

[6] 10 & 11 Vict. c. 47.

485. The Crown Charters Act of 1847[1] simplified the forms of Crown charters and the procedure for obtaining them. It was further made competent to obtain a combined Crown charter of confirmation and precept, so that even apart from the provisions of the Service of Heirs Act it was unnecessary, where the ancestor was base infeft, for his heir to go through the cumbersome procedure of completion of title first to the mid-superiority, then to the property, and thereafter to consolidate the two fees.

SUBSECTION (3).—*Precepts and Writ of Clare Constat.*

486. Writs of *clare constat* were introduced by the Titles to Land Act, 1858.[2] The only material difference between a writ of *clare constat* and a precept of *clare constat*, in their present form, is that the precept contains a precept of sasine, whereas the writ does not. The writ of *clare constat* can be recorded, or a notarial instrument or notice of title can be expede on it and recorded within the lifetime of the grantee;[3] whilst a precept of *clare constat* can either be recorded, or a notarial instrument or notice of title can be expede on it and recorded, or an instrument of sasine, in the old form, on account of the precept of sasine contained in the precept of *clare constat*, can be expede and recorded.

487. The Consolidation Act of 1868[4]—re-enacting, with variations, the provisions of the Act of 1858—enacts that precepts of *clare constat* may be in, or as nearly as may be in, the form given in Schedule (W), No. 2, annexed to the Act; and that in all cases in which it is or may be competent to grant precepts of *clare constat* it shall be competent and sufficient to grant a writ of *clare constat* in, or as nearly as may be in, the form given in Schedule (W), No. 1, annexed to the Act, and to record such writ of *clare constat*, with a warrant of registration thereon, in the appropriate Register of Sasines. It shall be competent, the section also provides, so to record any precept of *clare constat*, with warrant of registration thereon; and such writ of *clare constat*, or precept of *clare constat*, being so recorded, shall have the same legal force and effect in all respects as if a precept of *clare constat* had been granted, and an instrument of sasine thereon had been expede, in favour of the person on whose behalf such writ or precept of *clare constat* and warrant of registration are presented for registration and recorded, at the date of recording the said writ or precept and warrant, according to the law and practice in force prior to the 1st day of October 1858. The section further provides, that subject-superiors shall be bound to grant such writs of *clare constat*, if required by the heir entitled to demand the same: provided always that the heir shall, if required, produce a charter or other writ shewing the *tenendas* and *reddendo* of the lands in which his ancestor died infeft; and shall also, at the same time, pay or tender to the superior such duties or casualties as he may be entitled to demand.

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[1] 10 & 11 Vict. c. 51, s. 21.

[2] 21 & 22 Vict. c. 76, s. 11.

[3] 31 & 32 Vict. c. 101, s. 101; and see ss. 3 and 17.

[4] *Ibid.*, s. 101.

488. The Consolidation Act, 1868, s. 102 (re-enacting, with variations, s. 7 of the Titles Act of 1860),[1] also makes it competent for the heir of any person who died last vest and seised in any lands held burgage, to obtain from the magistrates of the burgh within which the lands are situated, a writ in, or as nearly as may be in, the form given in Schedule (W), No. 3, annexed to the Act. Such writ of *clare constat* may be signed by the provost or acting chief magistrate for the time, and by the town clerk, or, where there is more than one town clerk, by one of the town clerks, and when so signed shall be as valid as if signed by the whole of the magistrates; it may, with warrants of registration thereon in favour of such heir, be recorded in the appropriate Register of Sasines; and when so recorded it has, according to the Act, the same effect in all respects as if, at the date of such recording, cognition and entry of such heir had taken place in due form, and an instrument of cognition and sasine in regard to such lands and in favour of such heir had been expede and recorded according to the law and practice in force prior to the 1st day of October 1860. Although the Conveyancing Act, 1874,[2] enacts that there shall not, after the commencement of the Act, be any distinction between estates in land held burgage and estates in land held feu in so far as regards the conveyances relating thereto, or the completion of titles, or of any of the matters or things to which the provisions of the Act relate, it is still competent to use the form of writ of *clare constat* supplied by Schedule (W), No. 3, of the Act of 1868, in the case of subjects held burgage, because by s. 26 of the later Act it is provided that "conveyances of land" theretofore held burgage may be in the forms allowed by the Act of 1861 in regard thereto, the word "conveyances" here including, it is thought, writs of *clare constat*.

489. Re-enacting, with variations, ss. 18 and 19 of the Crown Charters Act, 1847,[3] and s. 11 of the Titles Act, 1858,[4] the Consolidation Act of 1868 [5] provides a method for obtaining either a Crown writ of *clare constat* or a precept from Chancery by any person who has obtained himself served, specially or generally, as heir to a deceased ancestor who held lands of the Crown. But it may be said that in practice neither of these writs is used by an heir in taking infeftment in lands held of the Crown, infeftment in such a case being invariably taken by an heir recording an extract decree of special service in his favour, when his ancestor died infeft, and by expeding and recording a notarial instrument, following on an extract decree of general service, when his ancestor died with only a personal title to the lands. As to the procedure necessary where an heir desires either a Crown writ of *clare constat* or a precept from Chancery, see CHANCERY.[6]

490. The Act 1693, c. 35, provided that procuratories of resignation and precepts of sasine should continue to be sufficient warrants for infeftment notwithstanding the death of the granter or grantee, but the provisions of the Act did not apply to precepts of *clare constat*; and prior to the Lands Transference Act, 1847,[1] a precept of *clare constat* became ineffectual if infeftment under it had not been taken prior to the death of either the granter or the grantee. But the Act of 1847 [2] enacted that all precepts of *clare constat* by subject-superiors should, notwithstanding the death of the granter thereof, remain in full force and effect during the whole lifetime of the grantee, and should continue effectual as a warrant for giving infeftment to the grantee in terms thereof at any time during the grantee's life. Re-enacting the provisions of earlier Acts,[3] the Titles to Land Consolidation Act of 1868 [4] enacts that all writs and precepts of *clare constat*, whether from subject-superiors or from magistrates of a burgh, already made and granted and still subsisting and in force, and all such writs and precepts of *clare constat* to be made and granted thereafter, shall, notwithstanding the death of the granter thereof, remain in full force and effect during the lifetime of the grantee, and shall continue effectual as a warrant for giving infeftment to the grantee personally by sasine in terms thereof, or by recording the same, with warrant of registration thereon in his favour, at any time during the grantee's life. But it must be kept in view that, although all writs and precepts of *clare constat* by subject-superiors or by magistrates of a burgh are valid warrants of infeftment in favour of the grantee during his life, yet all Crown writs of *clare constat* or precepts issued from the office of Chancery are null and void unless recorded with a warrant of registration thereon, on behalf of the heirs in whose favour they are granted, in the appropriate Register of Sasines before the first term of Whitsunday or Martinmas posterior to the date of such writ or precept, without prejudice to a new writ or precept of *clare constat* being issued.[5] The object of this provision was that the Crown might not be deprived of non-entry duties by an heir's delay in taking infeftment. Between 1858 and 1868, however, owing to a defect in the Titles Act of 1858, a Crown writ of *clare constat*, but not a precept, could be recorded at any time during the lifetime of the grantee.

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[1] 23 & 24 Vict. c. 143.

[2] 37 & 38 Vict. c. 94, s. 25.

[3] 10 & 11 Vict. c. 51.

[4] 21 & 22 Vict. c. 76.

[5] 31 & 32 Vict. c. 101, ss. 84 and 85.

[6] *Ante*, vol. iii. p. 194.

491. A precept or writ of *clare constat* can be granted only to the immediate heir of the investiture, and is not a competent mode of completing the title of one who is not, at the time of granting it, the immediate heir of a person who has died infeft in lands, even although the immediate heir has consented to it. Thus where a precept of *clare constat* was granted to the immediate heir in liferent and his son in fee, an infeftment taken in these terms was held inept as regards the son.[6] A disponee cannot make up a title by precept or writ of *clare constat*.[7]

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[1] 10 & 11 Vict. c. 48.

[2] *Ibid.*, s. 15.

[3] 10 & 11 Vict. c. 48, s. 15; 21 & 22 Vict. c. 76, ss. 1 and 36; and 23 & 24 Vict. c. 143, s. 7.

[4] 31 & 32 Vict. c. 101, s. 103.

[5] *Ibid.*, s. 86.

[6] *Landales* v. *Landales*, 1752, Mor. 14465; 2 Ross, L.C. 253; *Finlay* v. *Morgan & Ors.*, 1770, Mor. 14480; 2 Ross, L.C. 265.

[7] Bell's Prin., s. 1818.

At common law, a precept of *clare constat* was not invalid although it did not set forth the precise character in which the heir claimed an entry;[1] and the reason given for this was that a precept of *clare constat*, not being an *actus legitimus*, and being applicable to a particular subject and investiture only, was not to be tried by the same punctilious rules as a service.[2] The Conveyancing Act, 1874,[3] however, now provides that, notwithstanding any existing law or practice, it shall be no objection to any precept or writ from Chancery or of *clare constat*, or to any decree of service, whether general or special, or to any writ of acknowledgment, whether obtained before or after the commencement of the Act, or to any other decree, or to any petition, that the character in which an heir is or may have been entitled to succeed is erroneously stated therein; provided such heir was in truth entitled to succeed as heir to the lands specified in the precept, writ, decree, or petition.

492. An entry by precept of *clare constat* did not imply passive representation beyond the value of the subject.[4] Where an investiture is renewed by precept or writ of *clare constat*, the precept or writ does not import a new investiture, and accordingly it was held, in the case of *Stewart*,[5] that limitations in a feu-right regarding the casualties of superiority were not altered by a renewal of the investiture by a precept of *clare constat*, in which they were not repeated, on the ground that a precept of *clare constat* is merely the acknowledgment of a person as heir of his predecessor under the conditions and obligations contained in the investiture, and that any alteration thereon can only be made by express agreement.[6] If an infeftment is taken on a writ or precept of *clare constat* granted by a superior not infeft, the vassal's infeftment will become effectual by accretion on the superior's infeftment.[7]

493. Since the commencement of the Conveyancing Act, 1874, a writ or precept of *clare constat* is, it is thought, an *ex facie* valid irredeemable title to land in the sense of s. 34 of that Act, and, on being recorded in the appropriate Register of Sasines, is a sufficient foundation for the positive prescription of twenty years, for this reason that, as the law stood before 1874, a prescriptive progress of titles, starting from the infeftment of an heir to whom a precept of *clare constat* had been granted, did not require to contain the warrant of the heir's infeftment.[8] A decree of service was secured from challenge, so far as it represented a verdict of propinquity in favour of an heir, by the running of twenty years after its date; but this vicennial prescription, introduced by the Act 1617, c. 13, as to retours, did not apply to precepts and writs of *clare constat*.[9]

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[1] *Crichton's Crs.* v. *Wood*, 1798, Mor. 15115; 2 Ross, L.C. 280; *Durham's Trs.* v. *Graham*, 1798, Mor. 15118; 2 Ross, L.C. 287; *Fairservice* v. *Whyte*, 1789, Mor. 14486; 2 Ross, L.C. 286.

[2] Per Lord Balgray in *Ogilvy* v. *Ogilvy*, 1817, Hume, 724; 2 Ross, L.C. 288.

[3] 37 & 38 Vict. c. 94, s. 11.

[4] *Farmer* v. *Elder*, 1683, Mor. 14003.

[5] 3rd June 1813, F.C.

[6] See also *Mags. of Edinburgh*, 1777, 5 Bro. Supp. 612.

[7] *Dickson* v. *Syme*, 1801, Mor. App. Tailzie, 7.

[8] 1617, c. 12; and *Earl of Argyle* v. *M'Naughton*, 1671, Mor. 10791; 3 Ross, L.C. 372.

[9] *Neilson* v. *Cochrane's Reprs.*, 1837, 15 S. 365; 1840, 1 Rob. App. 82; Ersk. iii. 8, 71; and see 37 & 38 Vict. c. 94, s. 13.

Subsection (4).—*Infeftment on Decree of Service.*

494. It has already been noted that the Service of Heirs Act of 1847 made provision for the insertion of a precept of sasine in a decree of special service, but that this precept was personal to the heir.[1] Accordingly during the lifetime of the heir title could be completed by expeding and recording an instrument of sasine, the warrant for which was the precept contained in an extract decree of special service. The Titles Act of 1858 provided for the direct registration of conveyances, which were defined as including decrees of special service.[2] The Consolidation Act of 1868 [3] provided that the extract decree of special service should have the operation and effect of a disposition from the ancestor to his heirs and assignees, so that after 1st October 1868 a feudal title might be completed in the person of the heir so served by recording the extract decree as a conveyance with a warrant of registration on behalf of the heir. Where the heir, after obtaining an extract decree, omitted to feudalise his title, the extract was available as a link in the title in the successors and assignees of the heir, as if the extract decree was an unrecorded conveyance in his favour. Until the introduction of implied entry in 1874 the heir who had taken infeftment on an extract decree of special service obtained an entry with the superior by means of a charter or writ of confirmation. The 1868 Act only gives the effect of a disposition to a decree of special service when it has been extracted, and therefore, in the case cited,[4] a notarial instrument expede by the disponee of an heir which bore to proceed upon a decree of special service but not on an extract of the decree was held expede without sufficient warrant. The same case decided that any person, on payment of the fees prescribed by the 1868 Act,[5] is entitled to obtain an extract of a decree of service, though such decree was not pronounced on a petition presented by him, and may use the decree so obtained for completing his title.

495. The effect of a decree of general service was not enlarged in the same way as the effect of the extract decree of special service. The Service of Heirs Act of 1847 [6] provided that an extract decree of general service should have the same effect as an extract retour of general service, and this provision was re-enacted in 1868.[7] That is, it had the effect of vesting in the heir any unfeudalised rights which were vested in the ancestor. A decree of general service was therefore appropriate where the heir merely desired to prove his character as heir, as a preliminary to completion of title, by obtaining a precept or writ of *clare constat* from the superior, or where the ancestor's title was unfeudalised. The extract decree of general service in such a case vested in the heir the right to use any unexecuted precepts of sasine or procuratories of resignation in the ancestor's title, and so to obtain an entry from the superior by confirmation or resignation. The 1874 Act,[1] however, provided that where the ancestor was infeft a decree of general service in favour of his heir should, if he had not died prior to 1st October 1874, be equivalent to a *mortis causa* general disposition of the lands in which the ancestor was infeft in favour of the heir, to the effect of enabling the heir to complete title as a general disponee, notwithstanding any incapacity of the ancestor. A general service expede by the heir of any person so served and dying after 1st October 1874, or by any of the successive heirs of the investiture, or by the heir of any general disponee, is declared to have the like effect as a transmission of the right to the lands. Any such services are made available as links of title for the person served with the person last infeft to the same extent as general dispositions.

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[1] *Supra*, para. 484.

[2] 21 & 22 Vict. c. 76, ss. 1 and 86.

[3] 31 & 32 Vict. c. 101, s. 46.

[4] *Lord Napier and Ettrick's Tr.* v. *de Saumarez*, 1900, 2 F. 882.

[5] 31 & 32 Vict. c. 101, s. 38.

[6] 10 & 11 Vict. c. 47.

[7] 31 & 32 Vict. c. 101, s. 37.

496. Completion of title by service has now almost entirely superseded the procedure by means of a writ from the superior, for it enables the vassal at his own hand, and without the superior's intervention, to obtain an infeftment which is not dependent on the title of the superior and is not affected by any defects therein. In the case of Crown holdings service is a necessary preliminary to obtaining a Crown writ or precept, and if an extract decree of service has been obtained it becomes unnecessary for the heir to obtain a writ from the superior. In the case where lands are held of a subject-superior, who is willing to grant a writ of *clare constat*, the heir's title may perhaps be completed more expeditiously than by service, which in some cases may be an advantage. Further, if the ancestor's title is defective or lost, the heir may complete title by a writ from the superior, possession on which for the prescriptive period will enable him to acquire a good title.[2]

497. Prior to the commencement of the 1924 Act [3] where a decree of service void or voidable for any reason was reduced within the vicennial period of prescription, any titles for which the service had been used as a link or warrant became defective.[4] The 1924 Act, however, provides that in the case of the reduction of a deed, decree, or instrument recorded in the Register of Sasines, or forming a link of title in a recorded title, such decree of reduction shall not be pleadable against a third party who has *in bona fide* onerously acquired right to the subjects contained in the deed, decree, or instrument which has been reduced prior to the recording in the sasine register of an extract of the decree of reduction or of a title in which it forms a link.[5]

SUBSECTION (5).—*Completion of Title to Personal Rights by Survivance.*

498. The Conveyancing Act 1874 [6] declares that a personal right to every estate in land descendible to heirs shall vest without service or other procedure in the heir entitled to succeed thereto.[1] Machinery was also provided for completion of title by a person acquiring right to lands as heir of a person who had merely a personal right to lands by survivance.[2]

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[1] 37 & 38 Vict. c. 94, s. 31.

[2] See PRESCRIPTION.

[3] 14 & 15 Geo. V. c. 27, 1st January 1925.

[4] *Stobie* v. *Smith*, 1921 S.C. 894.

[3] 14 & 15 Geo. V. c. 27, s. 46.

[6] 37 & 38 Vict. c. 94, s. 9.

SUBSECTION (6).—*Completion of Title by Heir of Granter of Trust Deed for Creditors.*

499. An infeftment on a trust disposition bearing to be for behoof of creditors does not divest the granter of the radical right of property, and his heir should complete title as heir and not by conveyance from the trustee.[3]

SECTION 6.—COMPLETION OF TITLE BY DISPONEES.

SUBSECTION (1).—*Original Vassal.*

500. The vassal under a charter from a superior completes title as a disponee in the manner explained below, subject to the observation that in his case there could never be any question of obtaining an entry with the superior by whom the charter was granted. Prior to 1858 the procedure was to expede an instrument of sasine on the precept of sasine contained in the charter, and to record the instrument in the appropriate Register of Sasines. On the introduction of direct registration of conveyances, registration in the appropriate register completed the infeftment of the vassal. Charters may contain a clause providing that they shall not be available as warrants for infeftment unless recorded within a limited time.[4] In such a case, if the charter is not timeously recorded, a minute of waiver by the superior is necessary before infeftment is taken. The minute is usually endorsed on the charter and recorded along with it. The charter may exclude from the grant the assignees of the original vassal until it has been recorded in the sasine register.[5] In such a case the charter does not form a warrant for the completion of title of singular successors of the original grantee until, with all its clauses, it has been recorded.

SUBSECTION (2).—*Entry with the Superior between* 1845 *and* 1874.

(i) *Entry by Confirmation.*

501. The Lands Transference Act of 1847 [6] provided that a person duly infeft under a title capable of being made public by confirmation should be entitled to compel entry in this manner by the form of process therein provided for. The vassal had to shew the terms of the holding, and to pay or tender the duties or casualties. The superior was entitled to insert clauses of *tenendas* and *reddendo* and the conditions, etc., unless these were specified or duly referred to in the sasine; but if so specified or referred to, these were not to be inserted at length without the vassal's consent. Sec. 7 provided that the charter should confirm the lands therein contained themselves and the sasine in favour of the person receiving the charter, and that it might be expressed in the form of Schedule D; and further that, in whatever habile form expressed, it should be held to confirm in favour of such person the whole dispositions, sasines, etc. necessary to be confirmed, although not enumerated. The Act also contained provisions,[1] where the superior's title was incomplete, for the vassal applying to the Lord Ordinary on the Bills to ordain the superior to complete his title and grant an entry, under pain (where the *reddendo* did not exceed £5) of forfeiture; or [2] to authorise an application to the Crown, prince, or mediate superior, for an entry as in vice of the immediate superior, so long [3] as the latter remained unentered, and thereafter until a new entry in favour of the vassal or his successors should be requisite. There were also provisions for the relinquishment of the superiority; and that the over-superior's rights were not to be affected or extended.[4]

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[1] *M'Adam* v. *M'Adam*, 1879, 6 R. 1256. See also *supra*, para. 479.

[2] *Supra*, para. 480.

[3] *Gilmour* v. *Gilmours*, 1873, 11 M. 853.

[4] Jur. Styles, 6th ed. i. 29.

[5] *Ibid.*, 158.

[6] 10 & 11 Vict. c. 48, s. 6.

502. The Titles to Land Act of 1858,[5] while it did not abolish instruments of sasine, rendered them no longer necessary, introduced the recording of the dispositions, etc., or notarial instruments (ss. 1 and 2), and provided for a writ of confirmation in the form prescribed (Schedule E) being written on the recorded deed, sasine, or notarial instrument, which confirmation was declared by the Act to be in all respects as effectual as a charter of confirmation. The vassal required to pay or tender the proper duties and casualties, and, in the case of lands held of a subject-superior, to produce a charter shewing the *tenendas* and *reddendo*. The charter of confirmation was not, however, abolished. Where the investiture imposed, or should thereafter impose, a prohibition against subinfeudation, or an alternative holding, this was not affected by the Act.[6]

503. The Titles Act of 1860 [7] provided that where the investiture contained such a prohibition, the conveyance or instrument should, if an entry was expede within twelve months of the date of such conveyance or instrument, have the same preference from the date of recording the conveyance or instrument as if the same contained an *a me vel de me* holding, and the investiture contained no such prohibition.

504. The Consolidation Act of 1868 [8] practically re-enacted the various provisions just referred to. In particular, it re-enacted [9] the provisions as to writs of confirmation, and it provided in Schedule T, Nos. 3 and 4, forms of a writ and of a charter of confirmation. The Act of 1868 [10] also authorised a person requiring confirmation, and entitled to demand an entry thereby, to demand from the superior either a writ of confirmation in the form given in Schedule V, No. 1, of the Act, which was engrossed on the recorded conveyance, or deed, or instrument constituting his infeftment; or, in his option, a charter of confirmation in the form given in Schedule V, No. 2, annexed to the Act. But, just as under the Act of 1858, such person had to produce to the superior, if required to do so, a charter or other writ shewing the *tenendas* and *reddendo* of the lands contained in the writ to be confirmed, in addition to paying or tendering such duties or casualties as were due to the superior; and the superior was entitled to insert or refer in the writ or charter granted by him to the whole clauses, burdens, and conditions contained in the former charter, in so far as they were not set forth at length or validly referred to in terms of the Act, or of any of the Acts it repealed, in the writ confirmed.

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[1] 10 & 11 Vict. c. 48, s. 8.

[2] *Ibid.*, s. 9.

[3] *Ibid.*, s. 10.

[4] 10 & 11 Vict. c. 51, s. 11 *et seq.*

[5] 21 & 22 Vict. c. 76.

[6] *Ibid.*, s. 28.

[7] 23 & 24 Vict. c. 143, s. 36.

[8] 31 & 32 Vict. c. 101.

[9] *Ibid.*, ss. 82 and 83.

[10] *Ibid.*, s. 98.

505. In the granting of all writs and charters by subject-superiors, the Act of 1868,[1] like the Act of 1858, provided that it should be sufficient to refer to the *tenendas* and *reddendo* of the lands therein contained as set forth at length, either in the writ or charter produced to the superior in terms of the Act, or in any charter or other writ recorded in any public register, and that subject-superiors should be bound, if required, to grant such writs and charters containing such reference in like manner as they were bound to grant similar charters according to the forms in use prior to 1st October 1858. Every charter and writ of confirmation, whether from the Crown or from a subject-superior, should, it was enacted, operate a confirmation of the whole prior deeds and conveyances necessary to be confirmed in order to complete the investiture of the person obtaining the writ or charter.[2] Removing a doubt entertained after the passing of the Titles to Land Act, 1858, as to whether writs of confirmation or of resignation required to be probative, the Act provided that they should be authenticated in the form required by the law of Scotland in the case of ordinary conveyances.[3]

(ii) *Entry by Resignation.*

506. A charter of resignation, or a charter of confirmation and resignation, could contain a precept of sasine in the form introduced by the Act of 1845,[4] because it was a deed in the sense of the Act, including a warrant on which sasine might follow. It has already been pointed out that instruments of resignation *in favorem*, the object of which was merely to connect a procuratory with a charter of resignation, fell into disuse, and the Act of 1845, on the narrative that such instruments were rarely used in practice and were wholly unnecessary, abolished them,[5] subject to this provision, that the deduction of titles required by the Statute 1693, c. 35, to be made in such instruments should, after the date of the Act, be made in the charter of resignation. The Lands Transference Act, 1847,[6] introduced no change as regards either the charter of resignation or the charter of resignation and confirmation.

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[1] 31 & 32 Vict. c. 101, s. 100.

[2] *Ibid.*, s. 115.

[3] *Ibid.*, s. 114.

[4] 8 & 9 Vict. c. 35, ss. 5 and 10.

[5] *Ibid.*, s. 9.

[6] 10 & 11 Vict. c. 48, s. 7.

507. The provisions of the Titles Act of 1858,[1] besides rendering the insertion of a precept of sasine unnecessary in a charter of resignation,[2] and making it competent to describe the lands by reference,[3] authorised infeftment under it by recording it with a warrant of registration in the appropriate Register of Sasines.[4] The Act, in addition to introducing writs of confirmation, also introduced writs of resignation and enacted [5] that where lands were held of a subject-superior, and a new investiture by resignation should be required, it should be competent for the superior to grant in favour of the party in right of the deed which was the warrant for resignation a writ of resignation as nearly as might be in the form of Schedule (F) of the Act, which should be written on such deed, and that the deed, with the writ of resignation written thereon, should be as effectual as if a charter of resignation had been granted in the usual form, according to the law and practice then existing, and that the superior should be bound to grant such writ of resignation instead of a charter of resignation, if required so to do.

508. It was also provided that the party requiring a writ of resignation not only should be entitled to demand an entry by resignation, but also should, if required, produce to the superior a charter or other writ shewing the *tenendas* and *reddendo* of the lands resigned, and should also at the same time pay or tender to the superior such duties or casualties as he might be entitled to demand. The writ of resignation, like the writ of confirmation, was declared to operate as a confirmation of the whole prior deeds and instruments necessary to be confirmed in order to complete the investiture of the party obtaining the writ. Further, it was declared competent to record in the appropriate Register of Sasines the deed, with the writ of resignation written thereon, and warrant of registration also written thereon; and the recording of the same, it was enacted, should have the same effect in all respects as if a charter of resignation had been granted, and such charter had been followed by an instrument of sasine duly expede and recorded at the date of recording the said deed and writ, according to the law and practice then existing, in favour of the party on whose behalf the deed and writ were presented for registration; "provided always, that the recording of such deed along with such writ shall have the effect of an instrument of sasine following on such deed." By mistake the word "not" was omitted after the word "shall," and the result was that writs of resignation by subject-superiors could not be used without creating a split. But this omission was remedied by the Titles Act of 1860,[6] which repealed the words above quoted, and enacted in lieu thereof that when a deed, which was the warrant for resignation, with a writ of resignation written thereon, had been or should be recorded in the appropriate Register of Sasines, the recording of such deed along with such writ should not have the effect of an instrument of sasine following on such deed. As in the case of charters of confirmation, charters of resignation might contain a reference to the *tenendas* and *reddendo* of the lands as set forth at length in any writ recorded in any public register (s. 10).

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[1] 21 & 22 Vict. c. 76.

[2] *Ibid.*, ss. 5 and 36.

[3] *Ibid.*, ss. 15, 16, and 36.

[4] *Ibid.*, ss. 1 and 36.

[5] *Ibid.*, s. 9.

[6] 23 & 24 Vict. c. 143, s. 33.

509. Accordingly, after 1858, a party desiring entry by resignation could do so in one of these ways: (*a*) by recording the disposition containing a procuratory or clause of resignation in his favour, with a writ of resignation from the superior of the lands written thereon, and warrant of registration also written thereon, in the appropriate Register of Sasines; or (*b*) by obtaining a charter of resignation (whether or not it contained a precept of sasine), and recording it with a warrant of registration; or (*c*) by obtaining a charter of resignation containing a precept of sasine, and recording an instrument of sasine thereon.

510. In drawing charters of resignation it was competent to insert a description of the lands in accordance with the provisions of the Titles Act of 1860.[1] This Act also provided that charters of resignation or sale should operate as a confirmation of the whole deeds and instruments necessary to be confirmed, in order to complete the investiture of the party in whose favour such charter might be or might have been granted (s. 39). With regard to this provision, it will be kept in mind that, although charters of confirmation confirming the lands and sasine in favour of the parties entering by confirmation operated, after 1847, confirmation of all writs requiring to be confirmed, and writs of confirmation and writs of resignation operated after 1858 as confirmation of all writs requiring to be confirmed, yet if the granter of a procuratory of resignation was not an entered vassal, and he desired, even after 1858, not a writ of resignation but a charter, it was necessary for him to obtain a charter of resignation and confirmation which confirmed all the transmissions and infeftments (including those of his author) subsequent to the last public infeftment. The provision, however, of the Act of 1860, making charters of resignation operate as a confirmation of all writs necessary to be confirmed, superseded the need for a charter of resignation and confirmation.

511. The Consolidation Act of 1868,[2] repealing the enactments regarding entry by resignation above mentioned, contained in the Acts passed between 1845 and 1868, substantially re-enacted them, but with variations. New forms of writs and charters of resignation were scheduled to the Act;[3] the writ required the name of the last entered vassal to be specified and the writ by which he was entered.

The Act of 1868 re-enacted the provisions of the Act of 1858, to the effect that it should be sufficient to refer to the *tenendas* and *reddendo* of the lands contained, *inter alia*, in charters or writs of resignation as these were set forth at length in any writ recorded in any public register; and that, if the person entitled to entry objected, the superior was not entitled in a charter or writ of resignation to insert the *tenendas* and *reddendo* at length, but only to make such reference to them;[1] and that all charters and writs of resignation should be authenticated in the form required by the law of Scotland in the case of ordinary conveyances.[2] The Act authorised not only the recording of a charter of resignation,[3] but also the expeding and recording of a notarial instrument on any charter of resignation.[4]

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[1] 23 & 24 Vict. c. 143, s. 34.

[2] 31 & 32 Vict. c. 101.

[3] *Ibid.*, Schedules T and V.

(iii) *Combined Charter.*

512. The charter of resignation and confirmation was used when the last disponee of property desired to enter by resignation as opposed to confirmation, and it has been shewn that this charter confirmed the transmissions and sasines subsequent to the last entered vassal's infeftment down to but exclusive of the disposition in favour of the disponee, who sought entry by resignation. Although this was the better practice, it was also held competent for a disponee to make up a title by a charter of confirmation and resignation, which confirmed the writs subsequent to the last entered vassal's infeftment, inclusive of his own infeftment, on the ground that he was entitled to make up a title either by resignation or by confirmation, or both, the one without prejudice to the other.[5]

SUBSECTION (3).—*Implied Entry.*

513. The Conveyancing (Scotland) Act 1874[6] contained a most important provision to the effect that infeftment should imply entry with the superior. "Every proprietor," runs the Act, "who is at the commencement of this Act,[7] or thereafter shall be, duly infeft in the lands, shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate Register of Sasines, duly entered with the nearest superior whose estate of superiority in such lands would, according to the law existing prior to the commencement of this Act, have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice, and that whether the superior's own title or that of any over-superior has been completed or not." It is further provided that, notwithstanding any provision, declaration, or condition to the contrary in any statute in force at the passing of the Act,[8] or in any deed, instrument, or writing, whether dated before or after that date, it shall not be necessary, in order to the completion of title of any person having a right to lands in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or other writ by progress. Charters and writs of confirmation, charters and writs of resignation, and combined charters of confirmation and resignation are abolished and made no longer competent, though it is provided that the enactment shall not prevent the granting of charters of novodamus or precepts or writs from Chancery, or of *clare constat* or writs of acknowledgment. Some doubts were expressed[1] as to the meaning of "precepts or writs from Chancery," but it is clearly settled by practice that the Crown is in the same position as a subject-superior.

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[1] 31 & 32 Vict. c. 101, s. 100. [2] *Ibid.*, s. 114. [3] *Ibid.*, s. 15. [4] *Ibid.*, s. 17.

[5] *Cunninghame* v. *Haldane*, 1754, 5 Br. Supp. 809; 2 Ross, L.C. 157; *Stewart* v. *Earl of Fife*, 1827, 5 S. 383; 2 Ross L.C. 160; Bell, Convey. 743.

[6] 37 & 38 Vict. c. 94, s. 4. [7] 1st October 1874. [8] 7th August 1874.

514. It is still competent, however, for a precept of sasine to be inserted in a conveyance,[2] and if this be done it is open to the grantee to expede and record an instrument of sasine, with warrant of registration in the appropriate Register of Sasines. But such a procedure is never now adopted.

515. The 1874 Act provides[3] that the prior vassal is to remain liable for all the obligations of the feu until notice has been received by the superior of the change of ownership. There are also preserved to the superior[4] all his right to casualties or feu-duties or arrears of feu-duties, due at or prior to the date of the implied entry, and all his rights and remedies for recovering these.[5]

516. The provisions of the Consolidation Act of 1868, so far as relating to charters or writs of confirmation or resignation, were not expressly repealed by the 1874 Act, but they were so repealed by the Statute Law Revision Act, 1893.[6]

SUBSECTION (4).—*Identification of Disponee.*

517. In the normal case of a disposition in favour of a person named and designed, infeftment by direct registration is the simplest method of completion of title, though procedure by means of a notarial instrument or notice of title is competent. It is only where the disposition is defective in the specification of the disponee, or in the description of the property or in some other feudal essential, that direct registration is not appropriate. In a disposition the name and designation of the disponee should be clear and unambiguous. The identification of a grantee is one of the most jealously guarded of the essential parts of a deed.[7] It is only where the disponee is named and designed that infeftment should be taken by direct registration. It is not, however, essential that the disponee be named in the deed.[8] The Conveyancing Act of 1924[9] does contemplate that a conveyance may be recorded with a warrant on behalf of a person not named therein, but this probably has reference to the common case where it is necessary to record a discharge or restriction of a heritable security with a warrant on behalf of the purchaser of the lands disburdened, who may not be mentioned in the deed, and also to cases under the Industrial and Provident Societies Act, 1893,[1] which authorises the registration of receipts for sums due under heritable securities in the form of *ex facie* absolute dispositions. In such cases registration of a receipt in statutory form is declared to vest in and convey over the security subjects to the person or persons entitled thereto at the date of the granting of the receipt. The person entitled to the security subjects may be and frequently is a person not mentioned in the receipt which is recorded. In the case of a disposition which is not in favour of a person named and sufficiently designed, it is hardly appropriate to insert any statements of fact in the warrant of registration for the purpose of identifying the person in whose favour the warrant is conceived with the disponee. It is thought that the title of such a disponee should be completed by notarial instrument or notice of title; and that the title of a disponee should only be completed by direct registration in cases where under the older law an instrument of sasine could have been expede *de plano* in favour of the disponee in virtue of a precept of sasine in which he was named and designed as in the dispositive clause of the deed.[2] There should not, however, be any serious objection to supplementing in the warrant the designation of a person who is named or designed in the deed under a name and designation which pertained to him at the date of execution of the deed presented for registration, and which was sufficient for identification at that date, *e.g.* register on behalf of the within-named A. B. now Mrs. A. B. or C., wife of D. C., (designation), etc.

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[1] Mowbray's Analysis, p. 13.

[2] 31 & 32 Vict. c. 101, s. 163.

[3] 37 & 38 Vict. c. 94, s. 4 (2), Schedule A.

[4] *Ibid.*, s. 4 (3).

[5] See SUPERIOR AND VASSAL.

[6] 56 Vict. c. 14.

[7] Menzies, 171, 503.

[8] Bell's Prin., s. 876.

[9] 14 & 15 Geo. V. c. 27, s. 10 (1).

(i) *Descriptive Disponees.*

518. As mentioned above, it is not essential that the disponee be named in the deed. A disposition to "the heir of A.," or to any other ascertainable person or persons, is a valid warrant [3] for infeftment. Or reference may be made to another deed executed or to be executed for the identification of the disponee, or the grant may be to a person to be named by a person appointed by the granter to nominate him. A conveyance to a person unknown who may not be in existence, not being the heirs or children of a person to whom a liferent is conveyed, is, however, without the interposition of a trust,[4] a conveyancing impossibility. According to the older practice infeftment could only be given to a person specially named in the precept or by operation of statute [5] to his heirs or assignees. The introduction of abbreviated forms of conveyancing has not modified the underlying principles,[6] and if a disponee is not described *nominatim* but as the heir of some other person, a decree of general service or some form of declarator is necessary before such heir can complete title, not to take up the right which has vested in him by delivery of the disposition, but as declaratory of his character, such decree being used as one of the warrants for a notarial instrument or notice of title.[1]

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[1] 56 & 57 Vict. c. 39, s. 44 (2).

[2] 31 & 32 Vict. c. 101, s. 15.

[3] Bell's Prin., s. 876.

[4] *Colvile's Trs.* v. *Marindin*, 1908 S.C. 911; *Blackwood* v. *Colvil's and Russell's Reprs.*, 1740, 2 Ross, L.C. 18.

[5] 1693, c. 35.

[6] *Hay* v. *Corporation of Aberdeen*, 1909 S.C. 554, per Lord Dunedin.

519. The interpretation clause of the Consolidation Act of 1868[2] provides that "all codicils, deeds of nomination, and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances separately granted, and decrees of declarator naming or appointing persons to exercise or enjoy the rights or powers conferred by such deeds or conveyances, shall be deemed and taken for the purposes of this Act to be parts of the deeds or conveyances to which they severally relate, and shall have the same effect in all respects, as to the persons so named and appointed, as if they had been named and appointed in the deeds or conveyances themselves." In the case therefore of a disposition, say to trustees who are not named and designed in the conveyance but are ascertainable by reference to some other deed, it is no doubt competent to take infeftment by recording the disposition with a warrant of registration on behalf of the trustees *nominatim* for the sake of convenience, a reference being made in the warrant to the deed in which the trustees are appointed and named and designed. In the case figured, and in all similar cases, however, it is better that infeftment should be taken by means of a notarial instrument or notice of title. If it is desired that the disposition itself should enter the sasine register, it may be recorded along with a notarial instrument in the form of Schedule N to the 1868 Act,[3] or a notice of title in the form of Schedule B (2) to the 1924 Act.[4]

520. Infeftment in feudal property cannot be given to a firm or unincorporated body *socio nomine*, and a disposition of heritage to a firm does not divest the disponer.[5] Infeftment must be taken in the names of trustees for the firm. Infeftment in name of A., one of the partners of B. & Co., and the other partners of the said company was, however, held equivalent to the infeftment of A. as trustee for himself and his partners;[6] but in another case[7] infeftment in name of one partner with the addition of the words "and company" was held inept. Possibly, however, in virtue of the provisions of the interpretation section of the 1868 Act quoted in the preceding paragraph, infeftment might follow on a disposition to the partners of A. B. & Co. if there was a written contract of copartnery naming and designing the partners of the firm.

(ii) *Nominate Conditional Institutes.*

521. At one time very conflicting views were held as to the manner in which nominate constructive conditional institutes should complete title on succession as institutes. The simplest case arises in the case of a *mortis causa* disposition to A. whom failing to B. B. is a constructive conditional institute, and if A. predeceases the granter of the conveyance, B. is the institute under the deed. There was diversity of opinion as to whether it was necessary for B. by any process to prove his character as institute, and in practice he was required to serve as heir of provision both to the granter of the conveyance and to those persons called before him under the destination.[1] The case of *Hutchison*,[2] however, established the rule that in such a case no service was necessary, and it was laid down that when a person by *mortis causa* conveyance dispones to a series of heirs or individuals, whom failing to a person named, and such person is the first to take under the destination, he takes as institute and is "without qualification or condition, disponee, and as such is entitled to use the executory clauses of the disposition for the purpose of feudalising his right as disponee without service or declarator." The rule laid down only applies to the case of nominate conditional institutes. Declaratory service or some other form of proof of the identity of the institute is required where he is not named and designed in the disposition, and infeftment cannot be taken by direct registration of the disposition.[3]

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[1] *Stewart* v. *Stewart*, 16th November 1803, Hume, 880; 1 Ross, L.C. 591; *Kennedy* v. *Arbuthnot*, 1722, 1 Ross, L.C. 566; *Stewart* v. *Porterfield*, 1831, 1 Ross, L.C. 569; *Barstow* v. *Stewart*, 1858, 20 D. 612; *Macdougall*, 1900, 3 F. 99; Bell, Convey. 646; Menzies, 788.

[2] 31 & 32 Vict. c. 101, s. 3.

[3] *Ibid.*, s. 23.

[4] 14 & 15 Geo. V. c. 27, s. 4 (2).

[5] *Morison* v. *Miller*, 1818; Hume's Decisions, 722; 2 Ross, L.C. 24.

[6] *Denniston* v. *Macfarlane*, 1808, 2 Ross, L.C. 23.

[7] *Morison* v. *Miller*, *supra*.

(iii) *Dispositions to Persons with Different Interests.*

522. A fee in favour of two successive parties cannot be constituted at the same time. If there is a disposition *inter vivos* to A. whom failing to B., A. will complete title as disponee; but if the succession thereafter opens to B. he must complete title as substitute and heir of provision.[4] But where there is a disposition to A. and B. and the survivor in fee, or in terms with the like effect, and infeftment has taken place in favour of A. and B., the survivor requires to make up no further title. The right of the joint disponees in such a case may be compared to that of trustees, which transmits to the survivors without a new investiture; if no infeftment has been taken on the deed prior to the death of one of them, the survivor, it is thought, can make up a title to the whole fee without service or other procedure by taking infeftment *de plano* in his own favour.[5] It would be appropriate in such a case, however, to describe such person in the warrant of registration as the survivor of the joint disponees, so that *ex facie* of the register it may appear that infeftment is being taken in the whole fee. Where different feudal rights are conveyed to more than one person by the same disposition, as to A. in liferent and B. in fee, the disposition may be recorded with separate warrants of registration on behalf of each person, or where all have the same agent one warrant is sufficient. Statute requires nothing more than the identification of the parties in whose favour the warrant is conceived, leaving the character and extent of the right to which title is completed to be gathered from the terms of the writ to which the warrant has reference. Accordingly, except in the case mentioned in the immediately succeeding paragraphs, the general practice is to omit from the warrant any peculiarity in the destination or in the character of the parties, and simply to add after their specification the words "for their respective rights and interests," or in the case of trustees, the words "as trustees within mentioned," or otherwise as the case may be.

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[1] Bell, Convey. 1106; Menzies, 886.

[2] *Hutchison* v. *Hutchison*, 1872, 11 M. 229.

[3] *Supra*, para. 476.

[4] *Ker* v. *Howison*, 1708, 2 Ross, L.C. 25.

[5] *Bisset* v. *Walker*, 1799, Mor. *voce* "Deathbed," App. No. 2.

(iv) *Conveyances in Liferent and Fee.*

523. Where there is a conveyance to one person in liferent and others in fee, it may result that the nominal liferenter is a constructive fiar.[1] This only arises where there is a conveyance to a parent in liferent and his children in fee, and the cases in which this result follows are restricted by the operation of the Trusts (Scotland) Act, 1921.[2] If the nominal liferenter is truly the fiar infeftment should be taken in terms of the complete destination contained in the conveyance. If there is a conveyance to A. in liferent and his children in fee under which the beneficial fee has vested in the parent, it is not enough for A. to record the conveyance with a warrant of registration conceived in favour of himself in liferent.[3] If this course is taken the fee remains with the granter of the conveyance on the old investiture. The proper course is to record the conveyance with a warrant in favour of "A. in liferent and his children in fee," for under the older practice it is only in such terms that it would have been possible to expede an instrument of sasine.

524. Where the conveyance is to one person in liferent and others *nominatim* in fee, no difficulty in completion of title arises. But the conveyance may be to one in liferent and to heirs or children in fee in such terms that the beneficial fee is vested in an indeterminate class, while a fiduciary fee vests in the liferenter. Where there is a conveyance to the heirs of a person or of a marriage, the beneficial fiar cannot be ascertained until the death of that person or the dissolution of that marriage.[4] A conveyance to children, on the other hand, if in unqualified terms, will give a vested beneficial right to each child at birth, subject to partial defeasance in the event of future children of the class coming into existence, so as to allow these also to take an equal share; but until the class has become fixed the title in fee of those comprising the class cannot be completed, and the law has invented the fiction of a fiduciary fee in the liferenter for the ultimate beneficial fiars.[1] In order to protect the beneficial fiars against the creditors of the granter of the conveyance, the fiduciary fiar should take infeftment in terms of the destination contained in the disposition, or preferably in favour of himself and on behalf of his children. In the case of *Barstow*,[2] Lord Justice-Clerk Hope observed: "I am not sure that this is not the best and the most logical and consistent way of executing such a precept." Until the fiduciary fee has been feudalised the granter of the conveyance remains undivested of the fee.

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[1] *Frogs' Crs.* v. *His Children*, 1735, Mor. 4262; 3 Ross, L.C. 602; *Newlands* v. *Newland's Crs.*, 1798, 4 Pat. 43, 3 Ross, L.C. 634; *Livingstone* v. *Waddell's Trs.*, 1899, 1 F. 831; *M'Dougall* v. *M'Dougall*, 1902, 9 S.L.T. 366.

[2] 11 & 12 Geo. V. c. 58.

[3] *Livingstone* v. *Waddell's Trs.*, *supra*.

[4] *Ferguson* v. *Ferguson*, 1875, 2 R. 627; *Maule*, 1876, 3 R. 831; *Gollan's Trs.* v. *Booth*, 1901, 3 F. 1035.

525. A question which has been much canvassed [3] is whether, in the case where the fiduciary fee has been feudalised, the beneficial fiars, when ascertained, should complete title (*a*) by service to the fiduciary fiar, or (*b*) as disponees under the conveyance from the maker of the destination. One opinion is that the precept expressed or implied in the conveyance is exhausted by the feudalising of the fiduciary fee.[4] The other is that the precept authorises infeftment in (*a*) a liferent, (*b*) a fiduciary fee, and (*c*) a beneficial fee, and remains unexhausted until the title of the beneficial fiars has been completed. The latter opinion is preferable, for the other is hardly consistent with the case of *Maule*.[5] In that case the destination was to the spouses and the survivor in liferent and the heirs male, whom failing the heirs female of the marriage in fee. The marriage was dissolved by the death of the husband, and it was observed by Lord President Inglis that as at the moment of the dissolution of the marriage the heir of the marriage was ascertained, the right of the real fiar then emerged, and the survivor of the spouses ceased to have any fiduciary fee. It seems clear, therefore, that the beneficial fiar should complete title, when ascertained, as an innominate disponee, in accordance with the principles explained above,[6] by using a decree of general service as a link in title. This course was approved in the case of *M'Dougall*.[6] Prior to the decision in the case of *Maule* it was considered competent to complete title by recording an extract decree of special service, but such a course is not now to be recommended.

SUBSECTION (5).—*Identification of Property.*

526. To allow of a valid instrument of sasine being *de plano* expede, it was necessary that the property should be identified in the deed containing the precept, or at least that the deed should contain such a description as, coupled with possession, was sufficient for its identification, and the same conditions must still be fulfilled before there can be infeftment by direct registration.[7] Where the property is not described in such a way as to make infeftment by direct registration possible, infeftment may yet follow where the lands are described in such a way as to be capable of identification by written evidence.[8] By the former practice the written evidence of identity had to be produced to the notary expeding the instrument of sasine, and read and published and stated in the instrument. The modern method of completion of title is considered below.[1]

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[1] *Houlditch* v. *Spalding*, 1847, 9 D. 1204.

[2] *Barstow* v. *Stewart*, 1858, 20 D. 612.

[3] Bell, Convey. 1105.

[4] Hendry's Styles, p. 155.

[5] *Supra*, para. 524.

[6] 1900, 3 F. 99.

[7] See DISPOSITION.

[8] Bell's Prin., s. 876.

SECTION 7.—COMPLETION OF TITLE OF GENERAL DISPONEE.

527. By a general disposition of lands is meant a conveyance which (1) from the want of a proper description of the lands affected, or (2) from the want of necessary feudal clauses, does not of itself constitute a warrant to the disponee to obtain infeftment by direct registration of the disposition in the Register of Sasines, or under the earlier law by expeding and recording an instrument of sasine.[2] An example of the first class of general disposition occurs where a testator disposes of his whole estate without further specification. An example of the second class occurred where before 1858 a disposition of lands contained neither a procuratory nor a clause of resignation, nor a precept of sasine.

Where a conveyance fell within the first class, *i.e.* where the warrant to infeft was general in regard to the lands conveyed, the general disposition was still a warrant for expeding an instrument of sasine, but it was necessary to produce evidence to the notary public instructing that the lands in which infeftment was being taken were comprehended in the warrant, and to refer to this evidence in the instrument.[3]

Where a conveyance fell within the second class and did not contain the executory clauses of an ordinary disposition, it was necessary for the disponee, in order to complete title, either (1) to obtain a supplementary disposition containing executory clauses from the disponee or his successors infeft in the lands, or (2) to obtain a decree of adjudication in an action of adjudication in implement.[4] Thereafter the disponee took infeftment in the same manner as an adjudger.

528. By rendering it unnecessary to insert a precept of sasine in any conveyance, the Act of 1858[5] made it unnecessary for the holder of a general disposition, without a precept of sasine or the other executory clauses, to resort to adjudication in implement for the purpose of obtaining a title to the lands. The Act provided that it should be competent to the disponee under a general conveyance, *inter vivos* or *mortis causa*, or to those deriving right from him, to complete title by expeding and recording a notarial instrument in statutory form.[6] Similar provisions were made with regard to burgage subjects by the Act of 1860.[7] The 1868 Act[8] re-enacted these provisions with variations. The disponee in whose favour a notarial instrument was expede and recorded was declared to be in the same position as if a conveyance of the lands contained in the instrument had been executed in his favour by the granter of the general disposition, and as if such conveyance had been followed by an instrument of sasine of the lands in favour of the grantee, expede and recorded in the Register of Sasines at the date of recording such notarial instrument. A notice of title in place of a notarial instrument is competent under the Act of 1924.[1]

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[1] *Infra*, para. 528.

[2] *Studd* v. *Cook*, 1883, 10 R. (H.L.) 53.

[3] *Duke of Norfolk* v. *Billers*, 1739, 2 Ross, L.C. 28.

[4] *Vide* ADJUDICATION, vol. i. p. 145.

[5] 21 & 22 Vict. c. 76, s. 12.

[6] *Ibid.*, Schedule H.

[7] 23 & 24 Vict. c. 143.

[8] 31 & 32 Vict. c. 101, s. 19, Schedule L.

529. Where the title of a disponee under a general disposition is being completed by notarial instrument or notice of title it is not necessary in such instrument or notice to specify the contents of the disposition in great detail. If there is a conveyance to certain persons and the survivors and survivor, or to a special series of heirs, such destination should be repeated in the instrument or notice. In the case of trustees where there is a conveyance to the acceptors and acceptor this need not be referred to unless one or more of the trustees have declined office, in which case this should be narrated and the evidence of declinature produced as one of the warrants for the instrument or notice. It may be thought desirable, but is not necessary, to repeat provisions as to quorum and any special powers of dealing with the property to which title is being completed.

530. A general disposition which lacked the executory clauses of an ordinary disposition was not in itself, and apart from statute, equivalent to a special conveyance nor to an assignation of a personal right, and, accordingly, where the granter of the general disposition was not infeft, the grantee acquired no right to use unexecuted procuratories or precepts in the ancestor's title. The provisions of the Act of 1858 referred to above only applied to completion of title by a disponee where the granter of the general disposition was feudally infeft, or by persons having right by service to, or assignation, adjudication, or otherwise from, such a disponee. As a rule, a general disposition contained no clause of assignation of writs, and it was therefore impossible to use a general disposition as a warrant for completion of title of the grantee thereunder where the granter of such general disposition was not himself infeft.[2] This difficulty was removed by the 1874 Act[3] which enacted, with retrospective effect, that no decree, instrument, or conveyance should be deemed invalid because the series of titles connecting the person obtaining such decree or expeding such instrument or holding such conveyance with the person last infeft contained, as links in the series, two or more general dispositions, or because any general disposition forming a part of the series did not contain a clause of assignation of writs.

531. A real burden may be effectually imposed by a general disposition, and where so imposed must be inserted in any decree or instrument by the registration of which the title of the disponee is completed.[4]

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[1] 14 & 15 Geo. V. c. 27, s. 4 (1), Schedule B, No. 1.

[2] *Smith* v. *Wallace*, 1869, 8 M. 204.

[3] 37 & 38 Vict. c. 94, s. 29.

[4] *Cowie* v. *Muirden*, 1893, 20 R. (H.L.) 81.

SECTION 8.—COMPLETION OF TITLE BY ASSIGNEE OF UNFEUDALISED CONVEYANCE.

SUBSECTION (1).—*Infeftment Prior to* 1858.

532. The form of deed whereby a person having an unfeudalised or personal title to lands transferred his right was called a disposition and assignation,[1] and such a deed is still in common use. The substance of the deed, however, was the assignation in favour of the grantee of the unexecuted warrants to which the granter had a personal title, and a simple assignation of such unexecuted warrants alone was sufficient to transfer to the assignee the right to use the warrants.[2] The right to use unexecuted warrants could also be acquired by service or by adjudication.[3] The Lands Transference Acts of 1847 [4] and the Consolidation Act of 1868 [5] provided that a clause, "And I assign the writs," occurring in a conveyance of lands should, unless specially qualified, import an unconditional assignation, *inter alia*, to all open procuratories and precepts to which the granter had right. And the Conveyancing Act of 1874 [6] provided that the absence of such a clause from a general disposition should not affect its validity as a link in title.

SUBSECTION (2).—*Statutory Forms of Assignation.*

533. The Titles Act of 1858 made it competent to assign an unrecorded conveyance in forms prescribed by the Act,[7] the assignation being either written on the conveyance assigned or apart from it. Similar provisions regarding burgage property were made by the Act of 1860.[8] The provisions of the Acts of 1858 and 1860 were repealed and substantially re-enacted by the Consolidation Act of 1868.[9] The Act of 1924,[10] while not repealing the provisions of the 1868 Act, provides shorter forms of assignation. The operative part of these statutory forms of assignation is a mere assignation of the unrecorded deed, not a disposition of the lands. There is required in the forms of the 1868 Act, but not in those of the 1924 Act, a reference to the lands by name, but no detailed description. The Act of 1874 made no difference on the provisions of the Consolidation Act of 1868 with regard to assignations of unrecorded conveyances or to the ways of obtaining infeftment; but after 1874 the infeftment of the assignee in the lands implied entry with the superior,[11] whereas infeftment of the assignee prior to the commencement of the 1874 Act did not imply entry unless the warrant for his infeftment proceeded from the superior. There are three methods by which the assignee of an unrecorded conveyance, or where there is a series of assignations, the assignee under the last of the series, may complete his title. These are set forth in the immediately succeeding paragraphs.

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[1] Bell, Convey. 759.
[2] *Renton* v. *Anstruther*, 1843, 2 Ross, L.C. 435; 2 Bell, App. 214.
[3] *Supra*, para. 395.
[4] 10 & 11 Vict. c. 48, s. 3; c. 49, s. 2.
[5] 31 & 32 Vict. c. 101, s. 8.
[6] 37 & 38 Vict. c. 94, s. 29.
[7] 21 & 22 Vict. c. 76, ss. 13 and 14, Schedule I.
[8] 23 & 24 Vict. c. 143, ss. 9 and 10, Schedule F.
[9] 31 & 32 Vict. c. 101, s. 22, Schedule M.
[10] 14 & 15 Geo. V. c. 27, s. 7, Schedule C.
[11] *Supra*, para. 513.

SUBSECTION (3).—*Infeftment by recording Notarial Instrument or Notice of Title.*

534. A notarial instrument may be expede and recorded in terms of Schedule J of the Consolidation Act of 1868,[1] or a notice of title in terms of Schedule B, No. 1 of the 1924 Act.[2] The instrument or notice will in the first place set out all the material parts, and particularly the full description, contained in the disposition granted by the proprietor last infeft, and it will go on to set out the deed or deeds of transmission which have since been granted. This method is competent whatever may be the form of the deeds of transmission. The instrument or notice is recorded by itself alone, with a warrant of registration on behalf of the proprietor, and the title is complete.

SUBSECTION (4).—*Infeftment by recording Disposition along with Instrument or Notice.*

535. Infeftment can be obtained by recording both the disposition by the proprietor last infeft and a notarial instrument in the form of Schedule N of the Consolidation Act of 1868,[1] or a notice of title in the form of Schedule B, No. (2) of the 1924 Act.[2] As the disposition is also to be recorded, the instrument or notice merely specifies it as to be recorded along with the instrument or notice and refers to the lands without giving a proper description of them. Under the Consolidation Act of 1868, it was necessary to name the lands by a suitable name, *e.g.* "the lands of X.," but even this is unnecessary under the 1924 Act. Where a notarial instrument in the form of Schedule N of the 1868 Act was employed, a warrant of registration required to be endorsed on it in ordinary terms and also on the disposition, in view of the statutory requirement that all writs recorded in the Register of Sasines must bear a warrant of registration.[3] A docquet was required on the instrument as follows:—[4]

Docqueted with reference to warrant of registration on behalf of A. B. written on the said disposition.

536. Where a notice of title in the form of Schedule B, No. 2 of the 1924 Act is used, only one warrant of registration is required,[5] and is written on the notice of title as follows:—[6]

Register on behalf of the within-named A. B. in the register of the county of   along with the disposition and assignation (*or as the case may be*) docqueted with reference hereto.

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[1] 31 & 32 Vict. c. 101, s. 23.

[2] 14 & 15 Geo. V. c. 27, s. 4.

[3] 31 & 32 Vict. c. 101, s. 141.

[4] *Ibid.*, note to Schedule M.

[5] 14 & 15 Geo. V. c. 27, s. 10 (4).

[6] *Ibid.*, Schedule F, note 4.

A docquet is also required on the disposition in the following terms:—[1]

Docqueted with reference to notice of title in favour of A. B. recorded of even date herewith.

Whoever signs the warrants should sign the docquets also. There is no direction to design the party in the docquet, but if necessary for clear identification of the party the proper designation should be added.

Subsection (5).—*Infeftment by recording Disposition along with Assignation.*

537. Infeftment can be obtained by recording all the deeds, *i.e.* the disposition by the proprietor last infeft and the transmission or transmissions thereof.[2] This method is apparently available only if the assignations are in the forms, or substantially in the forms, prescribed by statute. If an assignation, written in the form of Schedule (M) No. 1 of the 1868 Act, was used, infeftment could be obtained by recording the assignation (or, in the event of there being more than one, the successive assignations) in the appropriate Register of Sasines, along with the deed or conveyance assigned and a warrant of registration thereon on behalf of the person completing title in the form of No. 2 of Schedule (H) to the Act, the assignation being docqueted with reference to the warrant of registration. If, on the other hand, an assignation in the form of No. 2 of Schedule (M) was used, *i.e.* an assignation written on the conveyance—the assignation or assignations could be so recorded, and the deed or conveyance, along with a warrant of registration thereon, the warrant being in the form of Schedule (H), No. 1. The Acts of 1858 and 1860,[3] whilst they contemplated the use of a docquet in the case of assignations written apart from the deed assigned, did not specially provide that such docquets should be used. The provisions of the Consolidation Act of 1868 were calculated to remove any doubts as to the validity of separate assignations without a docquet.

538. As Schedule H, Nos. (1) and (2) of the Consolidation Act of 1868 were repealed by the 1924 Act,[4] the method of completion of title by recording the dispositions and assignations provided by the 1868 Act would appear to be no longer competent; but where the assignations are in terms of Schedule C of the 1924 Act, a similar method of completion of title is available,[5] and it is provided that on the disposition together with the assignation or assignations being recorded in the appropriate Register of Sasines, the person completing title shall be in the same position as if his title were completed at the date of such recording by notarial instrument in the appropriate form duly expede and recorded. If the assignation or assignations are all endorsed on the disposition, a warrant of registration in the following terms is required:—[1]

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[1] 14 & 15 Geo. V. c. 27, Schedule B, note 7.

[2] 31 & 32 Vict. c. 101, s. 22; 14 & 15 Geo. V. c. 27, s. 7.

[3] 21 & 22 Vict. c. 76, s. 13; 23 & 24 Vict. c. 143, s. 9.

[4] 14 & 15 Geo. V. c. 27, s. 10.

[5] *Ibid.*, s. 7.

> Register on behalf of the within-named A. B. in the register of the county of along with the assignation (*or* assignations) endorsed hereon.

If there are any separate assignations which require to be recorded along with the disposition, the disposition and each separate assignation other than the last must bear a docquet as follows:—[2]

> Docqueted with reference to assignation in favour of C. D. recorded of even date herewith.

A warrant of registration is required on the assignation last in date as follows:—[3]

> Register on behalf of the within-named C. D. in the register of the county of along with the disposition (*adding if required* and assignation *or* assignations) docqueted with reference hereto.

As under the earlier procedure the warrants and docquets should be signed by the same person.

SUBSECTION (6).—*Infeftment of Assignee of Personal Right by Survivance.*

539. Before the commencement of the Conveyancing Act of 1874, lands belonging to an ancestor whose heir had not completed a title to them were said to be *in hæreditate jacente* of the ancestor, and the heir had to complete title before he was in a position to grant a conveyance containing the means of investing his disponee in the lands at once. But it was not uncommon for an heir-apparent to dispone the lands to a purchaser before he had taken any steps to vest himself in the lands *in hæreditate jacente* of his ancestor. Along with a conveyance of the lands the heir granted authority, either in the disposition or apart from it, to complete his own title.[4] On receiving the conveyance the disponee either could complete his title by first taking infeftment on the disposition in his favour, and then getting a feudal title made up in the person of the heir, and by the latter step the infeftment in his own favour was validated *accretione*; or, alternatively, he could first make up a feudal title in the person of the heir, and then take infeftment under the disposition in his own favour. When an ancestor died with only a personal right to land, and his heir desired to transfer this personal right to a third party, the following method of transference was sometimes adopted before 1874, viz.: the heir granted an assignation of the ancestor's unexecuted warrants, and a mandate to his assignee to expede a general service in his favour. After service was expede in favour of the heir, the assignee could take infeftment by expeding and recording a notarial instrument, specifying the disposition in the ancestor's favour, the extract decree of general service in favour of the heir, and the assignation in his own favour, and then obtain entry by a charter or writ of confirmation; or he could, after service had been expede, obtain a charter of resignation in virtue of the procuratory or clause of resignation in the ancestor's title, and take infeftment on the charter of resignation. But if he took infeftment in the former way, the decree of general service had to be deduced in the notarial instrument in accordance with the Act 1693, c. 35; and if he completed his title by charter of resignation, the decree had to be deduced in the charter of resignation, to satisfy the requirements of the Infeftment Act, 1845.[1]

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[1] 14 & 15 Geo. V. c. 27, Schedule F, note 4.

[2] *Ibid.*, Schedule C, note 2.

[3] *Ibid.*, Schedule F, note 4.

[4] Menzies, 635.

540. By the Conveyancing Act, 1874,[2] "estate in lands" means any interest in land, whether in fee, liferent, or security, and whether beneficial or in trust, or any real burden on land, and includes an estate of superiority, and a personal right to an "estate in land" vested in an heir is declared to be of the like nature and attended with the like consequences, and be transmissible in the same manner, as a personal right to land under an unfeudalised conveyance.[3]

541. The ways in which a personal right to land under an unfeudalised conveyance can be transferred have already been dealt with,[4] and probably the transference of a personal right to lands, especially if that right be one in fee or liferent, will be, in practice, by a disposition or a disposition and assignation granted by the heir in whom it is vested in favour of the person to whom he transfers it. But whatever be the mode of transference, the deed will not entitle the grantee to complete without judicial procedure a real right to the lands. The assignee of the personal right will, in virtue of the deed in his favour, be entitled to present a petition under s. 10 of the Act of 1874 to have it found that he is entitled to procure himself infeft in the lands, the extract decree in such a petition having the effect of a decree of special service, or in cases where this procedure is not competent he may proceed by way of adjudication. Or he may, ignoring the procedure of the 1874 Act, assign his interest in the succession, conferring on his assignee a mandate to complete title in his person, in which case the assignee will have the option either to use the machinery of the 1874 Act or to make up a feudal title in the person of the heir by service or other procedure, the infeftment of the heir validating as before 1874 any infeftment which has previously been taken by the assignee, and making effectual, if the disponee has not already taken infeftment, an infeftment thereafter taken by him.

SUBSECTION (7).—*Disposition by Person Uninfeft.*

542. Prior to the commencement of the Act of 1924[5] it was a cardinal rule of conveyancing that no person uninfeft could grant a conveyance of heritage which by itself was sufficient warrant for the infeftment of the grantee. This rule has been abrogated by the 1924 Act,[1] which enacts that if in a disposition of land granted by a person having a personal right thereto on which infeftment had not followed there is included a clause in statutory form [2] deducing the title of the disponer from the person last infeft, then on such disposition being recorded in the appropriate Register of Sasines the title of the grantee shall be in all respects in the same position as if his title were completed as at the date of such recording by notarial instrument duly expede and recorded. Any burdens imposed by any of the links of title must be referred to, or if they have not previously been inserted in the sasine register, must be set forth at length. See DISPOSITION: BURDENS.

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[1] 8 & 9 Vict. c. 35, s. 1.

[2] 37 & 38 Vict. c. 94, s. 3.

[3] *Ibid.*, s. 9.

[4] *Supra*, para. 532 *et seq.*

[5] 1st January 1925.

SUBSECTION (8).—*Deduction of Title.*

543. It is necessary where a person is completing title, whether by notarial instrument or by notice of title, or by a petition under s. 10 of the 1874 Act, or by other application to the Court, or by disposition from a person uninfeft, that the title of such person completing title, or in the last mentioned case the title of the disponer, should be deduced by setting forth the links of title connecting him with the person last infeft. In the case of a notarial instrument or notice of title, these links in title require to be produced to the notary or agent. The phrase "deduction of title," as used in the 1924 Act,[3] is defined as meaning the specification in a deed, decree, or instrument of the writ or series of writs (without narration of the contents thereof) by which the person granting such deed, or in whose favour such decree is conceived, or by whom such instrument is expede, has acquired right from the person from whom such title is deduced, and such specification is declared to be a compliance with any statutory instruction to "deduce" a title in terms of the 1924 Act. As regards the form of specification it is accordingly unnecessary to do more than to describe the links in title briefly by the names of the deeds and the names and designations of the parties, the dates of the deeds, and if they are recorded, the date of registration, without any paraphrase of the contents of the deeds. This was considered sufficient prior to the commencement of the 1924 Act, except in regard to deeds transmitting or extinguishing heritable securities, but there may be circumstances in which the purpose of a deed can be made clearer by the introduction of some narrative as to the effect of writs referred to as links in title.

544. The Act of 1924 [4] also declares what kind of writs may be specified as a title or link in title, and except as aftermentioned these provisions are merely declaratory of the law as it was prior to the commencement of the Act. The competent links of title mentioned in the Act are "any statute, conveyance, deed, instrument, decree, or other writing whereby a right to land or to any estate or interest in or security over land is vested in or transmitted to any person, or in virtue of which a notarial instrument could be expede, or which could be used as a mid-couple or link of title in expeding such instrument, or any minute of a meeting at which any person is appointed to any place or office, if such appointment involves a right to land or to an estate or interest in or security over land." A decree of the Court appointing a judicial factor on a trust estate gives the factor no right to heritable property, such as to make the decree available as a link in title.[1] It is thought, however, that the Act and Warrant appointing a *curator bonis* for an *incapax* is available as a link in title where the title of the *incapax* is not complete; for where the title of the *incapax* was, prior to the commencement of the 1924 Act, complete, the curator could grant a valid conveyance without completing title.[2]

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[1] 14 & 15 Geo. V. c. 27, s. 3.

[2] *Ibid.*, Schedule A, No. 1.

[3] *Ibid.*, s. 2 (3).

[4] *Ibid.*, s. 5.

545. Under the Consolidation Act of 1868 [3] the words "deed and conveyance" are defined so as to include extracts or office copies of such deeds and conveyances. The 1874 Act [4] provided that for the purpose of expeding a notarial instrument, the production to the notary public of a probate of testamentary writings by any Court in England or in Ireland or in any British colony or dependency, or of an exemplification of such probate, should be equivalent to production of the testamentary writings themselves, and the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887,[5] extended this privilege to letters of administration or exemplifications thereof. A definition is given of "extract" and "office copy" in the 1924 Act,[6] which would appear to be merely declaratory of the meaning of these words under the 1868 Act, except with regard to probates. They are each defined as including a duly authenticated extract of any Act, decree, or warrant of the Lords of Council and Session, or any inferior Court, or a duly authenticated extract or office copy from the Register of the Great Seal, or from the Books of Council and Session, or of any Sheriff Court, or of any other public authentic register of probative writs, or from the appropriate Register of Sasines, of any conveyance, deed, instrument, writing, writ, or decree; also as meaning and including a probate of the will or testamentary settlement of a person deceased, issued by any Court of Probate in England or Northern Ireland, or in any part of His Majesty's dominions, or an exemplification of such probate.

546. For the purpose of completion of title to heritable securities a "confirmation" as defined in the Act of 1924 [7] may, in the circumstances therein mentioned, be used as a link in title. As already mentioned a general disposition or two or more general dispositions may now be used as links in title.[8]

547. With reference to the provision of the 1924 Act [9] whereby "any minute of a meeting at which any person is appointed to any place or office, if such appointment involves a right to land or to an estate or interest in or security over land," may be used as a link in title, it is provided that any copy of or excerpt from such minute of meeting certified as correct by the chairman of such meeting or other person duly authorised to sign such minute or to give extracts therefrom or by any law agent or notary public, shall be *prima facie* evidence of the terms of such minute of meeting. The utility of the provision whereby a minute of meeting may be used as a link in title will be referred to later, but it may be noted that there appears to be statutory recognition of the truth of the proposition that a person appointed to an office involving a right to land does not require a conveyance or assignation of such right before he is in a position to complete title—a principle which has also received judicial recognition.[1] The same principle appears to be involved in the provision of the Consolidation Act of 1868 [2] that all codicils, deeds of nomination, and other writings annexed to or endorsed on deeds or conveyances or bearing reference to deeds or conveyances separately granted, and decrees of declarator naming or appointing persons to exercise or enjoy the rights or powers conferred by such deeds or conveyances, shall be deemed and taken for the purposes of the Act to be part of the deeds or conveyances to which they severally relate and shall have the same effect in all respects as to the persons so named and appointed as if they had been named and appointed in the deeds or conveyances themselves. The 1874 Act [3] also contains provisions under which executors nominate and testamentary trustees may complete title to a deceased's heritable estate though there is no conveyance to them, and this suggests the question whether a deed of assumption or of appointment of new trustees must contain a conveyance of the trust estate to the new trustees before it can be used as a link in title. This is a matter which does not appear to have been considered judicially since the modern conveyancing system was developed, but the interpretation given to "conveyance" by the 1868 Act, taken in conjunction with the provisions of the 1924 Act as to what writings may be used as a link in title would appear to justify the use as a link of any deed appointing trustees, without words of conveyance, where the deed constituting the trust is conceived in such terms as to entitle the original trustees acting thereunder to complete title. After 1874 and prior to the commencement of the 1924 Act the usual, if not the necessary, procedure for completion of title by trustees nominated to the office in succession to others was by conveyance from the heir of the sole or last surviving trustee who had served as heir of provision in trust.[4] Before such service was competent, however, it was essential that the heir should be of full age and subject to no legal incapacity. Where this procedure was not competent recourse might be had to adjudication.[5]

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[1] *Leslie's J. F.*, 1925 S.C. 464.

[2] *Scott*, 1856, 18 D. 624.

[3] 31 & 32 Vict. c. 101, s. 3.

[4] 37 & 38 Vict. c. 94, s. 51.

[5] 50 & 51 Vict. c. 69, s. 5.

[6] 14 & 15 Geo. V. c. 27, s. 2 (2).

[7] *Ibid.*, s. 5.

[8] *Supra*, para. 530.

[9] 14 & 15 Geo. V. c. 27, s. 5 (1).

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[1] *Kerr's Trs.* v. *Yeaman's Trs.*, 1888, 15 R. 520.

[2] 31 & 32 Vict. c. 101, s. 3.

[3] 37 & 38 Vict. c. 94, s. 46.

[4] *M'Lean*, 1892, 19 R. 1043.

[5] See ADJUDICATION, vol. i. p. 146.

SUBSECTION (9).—*Competition between Assignees.*

548. If a proprietor with a feudalised title dispones the same lands to two or more different *bona fide* disponees, the disponee who first takes infeftment is preferred, although the disposition in his favour should be of later date than the dispositions of the other disponee or disponees; and similarly, it is now settled that if a person having a personal title to lands assigns that title to two or more *bona fide* assignees, the assignee who first obtains infeftment is preferred.[1] The principle in both cases is the same: that the first infeftment carries the real right out of the person who was last infeft. In the case of *Bell* the facts were: O. obtained a decree of sale of a tenement in Kelso, and thereafter, in 1730, he, without having taken infeftment, conveyed the tenement by disposition containing a precept and the decree to C. C. took infeftment on this precept granted by O., and in 1732 granted to B. a heritable bond of relief, with a precept of sasine, in which B. was infeft. In 1734 G., a creditor of C., adjudged the tenement from C., and also the decree of sale; he then charged the superior and obtained a charter from him, on which he was infeft. The Court held that G. had right to the lands, on the ground that he had first completed a real right to them, the precept on which B. took infeftment being invalid, as C. the granter had only a personal right. Since the decision in this case the principle has received effect that he who first completes the real right, or in other words, he who first denudes the person last infeft, has the preferable right to the lands, and that therefore a cedent having a personal right to land is not divested thereof until infeftment in the person of his assignee has been taken. The remedy of a disponee of a feudalised right and of an assignee of a personal right, who have been ousted from obtaining a real right to the lands by a prior infeftment, is to fall back on the warrandice, express or implied, in their favour.

SECTION 9.—COMPLETION OF TITLE OF TRUSTEES AND LEGATEES.

SUBSECTION (1).—*Original Trustees.*

549. Where trustees or legatees have acquired a right to any property, and can connect themselves with the person last infeft in such property by appropriate links in title, they may complete title as disponees or assignees in the manner already discussed. The Consolidation Act of 1868 [2] provided that the use of the word "dispone" was not essential in *mortis causa* writings which were intended to operate as conveyances of land, but that words sufficient to carry moveables, if used with reference to heritage, should be equivalent to a general disposition by the testator to the grantee, and should be held to create in favour of the grantee an obligation upon the successors of the granter to make up titles in their own person to the heritage and convey the same to the grantee: it was further provided that it should be competent for the grantee to complete title at his own hand as a general disponee. By the operation of the section cited the Wills Act, 1861,[1] applies to wills dealing with heritage as well as moveables, and accordingly wills form an exception to the rule that deeds relating to heritage, to be effectual as links in title, must conform to the *lex rei sitæ*.[2] But the statute does not make heritage carried by such a will moveable in succession.[3]

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[1] *Bell* v. *Gartshore*, 1737, Mor. 2848; 2 Ross, L.C. 410; following *Brown* v. *Smith*, 1676, Mor. 2844, and overruling *Erskine* v. *Hamilton*, 1710, Mor. 2846; *Rule* v. *Pardie*, 1710, Mor. 2844; *Sinclair* v. *Sinclair*, 1733, Mor. 2848; see also Menzies, 629; Bell, Convey. ii. 770.

[2] 31 & 32 Vict. c. 101, s. 20.

550. Although the Act of 1868 made it competent to dispose of heritage by *mortis causa* deed in the same way as moveables, and without any words of conveyance, it did not provide any machinery whereby in such a case trustees or legatees could complete title, and it was considered necessary either to complete title to heritage by adjudication or to get the heir-at-law of the testator to complete title and convey to the trustees or legatees. The 1874 Act put such persons in the same position as if there had been a conveyance to them.[4] The Act contemplates that in such a case title may be completed either in name of the trustees or executors, or, where there is a bequest of heritage to a beneficiary, by such beneficiary in his own name.

551. There is room for doubt whether a will which contains no conveyance of heritage is to be regarded as a link in title such as to entitle the trustees or beneficiary thereunder, before completing title, to grant a disposition under which the disponee can take infeftment; [5] but for reasons already explained such doubts do not appear to be well founded.[6] It would be prudent, however, that the disposition in such a case should be granted by the trustees and the beneficiary with joint consent and assent.

SUBSECTION (2).—*Trustees assumed or appointed in Succession.*

552. Completion of title by trustees in substitution for or in succession to original trustees has also to be considered. The most usual case is where there is a deed of assumption by the old trustees in favour of others. If such deed contains a conveyance of the trust estate by old trustees whose title is complete, or who are in a position to complete same, in favour of themselves and the new trustees, then clearly it may be used as a link in title, and the title of the trustees completed by instrument or notice, or by direct registration of the deed where it contains a disposition of special estate described in appropriate terms.

553. The view has already been expressed [6] that trustees competently nominated to the office of trustee under a trust, whether *inter vivos* or *mortis causa*, which carries a right to heritage, do not require an express conveyance in their favour to enable them to complete title, such a conveyance being implied in the deed appointing them from the interpretation given to "deed" and "conveyance" by the 1868 Act,[1] at least since the commencement of the 1924 Act,[2] which provides that any writing whereby a right to land or any estate in land is vested in any person may be used as a link in title. The form of deed of assumption is, however, statutory,[3] and it is not suggested that the conveyance from the old to the new trustees should be omitted. But where new trustees are appointed, not by the existing trustees but by the truster or some other person authorised by him, such new trustees can, it is thought, complete title by instrument or notice. Such a case occurs where there is a destination to A. as trustee whom failing to B. If A. does not accept office, or even if he accepts office but resigns or dies before completion of title, B. may complete title by instrument or notice;[4] and it is not apparent why completion of title by A. as trustee before his death or resignation should necessitate any change in the method whereby B. should complete title. It is, however, the practice of the profession, in all cases where trustees are called in succession as substitutes to the original trustee or trustees, to complete the title of the substitutes by service as heir of provision in trust.

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[1] 24 & 25 Vict. c. 114.

[2] *Connell's Trs.* v. *Connell*, 1872, 10 M. 627; *Studd* v. *Cook*, 1883, 10 R. (H.L.) 53; *Browne*, 1882, 20 S.L.R. 76.

[3] 31 & 32 Vict. c. 101, s. 27.

[4] 37 & 38 Vict. c. 94, s. 46.

[5] 14 & 15 Geo. V. c. 27, s. 3.

[6] *Supra*, para. 547.

554. The procedure of service in trust is also sometimes employed where a new trustee is appointed by the truster, as by the spouses under a marriage contract, or by any person on whom the truster has conferred a power of appointment of trustees. The more usual course, which has statutory sanction, is that dealt with in the immediately succeeding paragraph.

SUBSECTION (3).—*Heir of Sole or Last Surviving Trustee.*

555. Where the conveyance to trustees contains a destination to the heir of a sole or last surviving trustee, expressed in such terms as to indicate an intention on the part of the truster that such heir is to be a trustee in succession, he may complete title as heir of provision in trust and may then administer the trust.[5] But such intention on the part of the truster will not be lightly presumed.[6] Prior to 1874 an heir of the sole or last surviving trustee, not called under the destination to the trustees, could not complete title to the trust estate. The 1874 Act,[7] however, contains provisions under which the heir, being of full age and not subject to any legal incapacity, of a sole or last surviving trustee, may, where there is no contrary provision in the deed of trust, and no contrary order is made by the Court of Session, complete title to the trust estate in the same manner as the title of any other heir may be completed—that is, by service. But an heir who completes title as heir of provision in trust in virtue of the powers conferred by the Act may not administer the trust except under the authority of the Court or by the consent of all the beneficiaries, who must all be of full age and subject to no incapacity. In the absence of such order, consent, or approval, the powers of such heir are limited to transferring the trust estate to (1) any trustee or factor appointed by the Court, or (2) any trustee duly appointed to the office, or (3) any persons whom the beneficiaries, as aforesaid, may have concurred in appointing as trustees, or (4) the beneficiaries themselves, if the only trust purpose remaining is the distribution of the estate. In case (1) the order of the Court in itself is usually sufficient warrant for completion of title;[1] as regards case (2) the view has already been expressed[2] that trustees duly appointed to an office carrying a right in trust to heritage may at least since the commencement of the 1924 Act complete title by expeding and recording a notice of title; but in the remaining two cases, where all the beneficiaries taking a vested interest under the deed of trust are in existence, of full age and subject to no legal incapacity, the completion of title by the heir of a sole or last surviving trustee will prevent the trust lapsing. Where the trust has lapsed application may be made to the Court for the appointment of new trustees or of a judicial factor.[3]

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[1] 31 & 32 Vict. c. 101, s. 3.

[2] 14 & 15 Geo. V. c. 27, s. 5 (1).

[3] 11 & 12 Geo. V. c. 58, s. 21, Schedule B.

[4] *Kerr's Trs.* v. *Yeaman's Trs.*, 1888, 15 R. 520.

[5] *Brown* v. *Hastie*, 1912 S.C. 304.

[6] *White* v. *Anderson*, 1904, 12 S.L.T. 493.

[7] 37 & 38 Vict. c. 94, s. 43.

SUBSECTION (4).—Ex officio *Trustees.*

556. A Statute of 1850[4] "to render more simple and effectual the titles by which congregations or societies associated for purposes of religious worship or education in Scotland hold real property for such purposes" as extended by the Titles Act of 1860,[5] the provisions of which were re-enacted by the Consolidation Act of 1868,[6] provided that where the original trustees to whom lands have been conveyed for religious or educational purposes have completed title, their successors in office appointed as mentioned in the title, or according to the rules of the congregation or society concerned, by the fact of their due appointment become feudally vest in the heritage. The provisions of the 1924 Act[7] as to the appropriate form of evidence—viz. a certified copy of or excerpt from minute of meeting where any person is appointed to any place or office involving a right to land or to any estate in land—may be useful to prove the title of such trustees to grant a conveyance. Similar provision was made with regard to trusts of any kind by the 1874 Act.[8] But though the class of trust to which the facility for the infeftment of *ex officio* trustees extends is unlimited, provided title has been completed by the original trustees to whom a conveyance has been granted by the deed of trust, it is only where each *ex officio* trustee is "the holder of any place or office or proprietor of any estate and his successors therein" that the provisions of the 1874 Act are applicable. It does not authorise the automatic investiture of trustees elected in a manner provided in the titles, as does the corresponding section of the 1868 Act.

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[1] *Infra*, para. 561.

[2] *Supra*, para. 547.

[3] *Infra*, para. 560.

[4] 13 & 14 Vict. c. 13.

[5] 23 & 24 Vict. c. 143.

[6] 31 & 32 Vict. c. 101, s. 26.

[7] 14 & 15 Geo. V. c. 27, s. 5.

[8] 37 & 38 Vict. c. 94, s. 45.

SECTION 10.—COMPLETION OF TITLE UNDER DECREE OF COURT.

SUBSECTION (1).—*Beneficiaries in Lapsed Trust.*

557. The Trusts (Scotland) Act 1867 [1] contained a provision under which a person entitled for his own absolute use to property, either heritable or moveable, the title to which was in the name of a trustee, factor, or curator who had died or was *incapax*, might apply to the Court for authority to complete title to such property in his own name; but the facilities introduced by the Act were only available to a beneficiary actually entitled and not to his representatives or assignees.[2] The Trusts (Scotland) Act, 1921,[3] re-enacted and extended the provisions of the Act of 1867, so that now the same facilities are available not only to the beneficiary himself, but to any person deriving right from him, provided that such person is entitled to the property in question for his own absolute use. In the case cited [4] the facilities were held not to be available when the beneficiaries were not entitled to the trust property for their own use as individuals, but as trustees for a charitable trust. The procedure is by petition to the Court by the beneficiary craving authority to complete title in his own name. It is required that the petition should specify and describe the heritable property and refer to an inventory in which the moveable or personal property is specified to which title is to be completed. On the granting of decree in terms of the crave of the petition the beneficiary may complete title by recording an extract of the decree in the appropriate Register of Sasines, with a warrant of registration on his behalf. The Trusts Act of 1921, following the provisions of the Act of 1867, provides that the warrant shall be effectual as a conveyance of heritable property in favour of the petitioner in like manner and to the same effect as a warrant in favour of a judicial factor, to which reference is made later. It is therefore appropriate that the subjects to which title is to be completed should be described in the crave of the petition as in a disposition of the lands, and that any real burdens or conditions affecting the subjects should be specified or validly referred to.

558. Where the procedure of the Trust Acts is not available [2] the beneficiary in a lapsed trust may at common law complete title by declaratory adjudication, the heir of the last surviving trustee being cited in such action.[5] Alternatively, where the heir of the last surviving trustee is able and willing to assist, he may himself complete title and convey the trust estate to the beneficiary.

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[1] 30 & 31 Vict. c. 97, s. 14.

[2] *M'Knight*, 1875, 2 R. 667.

[3] 11 & 12 Geo. V. c. 58, s. 24.

[4] *M'Clymont Trs.*, 1922 S.C. 503.

[5] See ADJUDICATION, vol. i. p. 146.

SUBSECTION (2).—*Trustees and Factors appointed by the Court.*

559. Various provisions are contained in the Trusts Acts [1] and Conveyancing Acts [2] with regard to the completion of title to heritage by trustees or factors appointed by the Court. The earliest provisions were made by the Titles Act of 1858 [3] and 1860 [4] in order to simplify the procedure whereby a judicial factor might complete title to heritage forming part of the trust estate under his management where it was necessary for him to do so. Formerly, it was necessary for the judicial factor after his appointment to apply to the Court for authority to make up titles, and on obtaining this authority to raise an action of adjudication.[5]

560. The Trusts Act of 1867 [6] first permitted an application for the appointment of a factor to include a crave for authority to complete title in his favour, but for some time thereafter the practice of the Court was first to appoint the factor, and later on his motion to grant the authority craved.[7] Applications for authority to complete title are now, however, commonly included in the petition for appointment, but authority for completion of title should not be craved unless it is clearly necessary. Sec. 15 of the Trusts Act of 1867 was superseded by s. 25 of the Act of 1921. The provisions of the Titles Acts of 1858 and 1860 were re-enacted with considerable additions by the Act of 1868 [8] as amended by the Amendment Act of 1869.[9] It was made competent, either in the petition for the appointment of a judicial factor, or in a separate application by the factor after his appointment, to crave authority for completion of title to heritage under the factor's management, either in the person of the factor or in the person of any pupil, minor, or lunatic, to whom he had been appointed factor. "Judicial factor" was defined in the Act as including "judicial factors or *curators bonis* to persons under incapacity, factors *loco tutoris*, factors *loco absentis*, and all judicial managers," and the procedure was available whether or not the title of the ward to any trust estate had been previously completed. Where it is desired to complete title to a trust estate which is the property of a pupil or other person subject to legal incapacity, title should be completed in the name of such pupil or other person, and not in the person of the factor or curator. Where, however, a factor is appointed *loco absentis*, or on the estate of a deceased person, the title should be completed in the person of the factor.[10] Where the title is complete in the person of the ward of a *curator bonis*, the curator is *in titulo* to convey the ward's estate.[11]

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[1] 30 & 31 Vict. c. 97, ss. 12 and 15, superseded by 11 & 12 Geo. V. c. 58, ss. 22 and 25.

[2] 31 & 32 Vict. c. 101, s. 24; 37 & 38 Vict. c. 94, s. 44; 14 & 15 Geo. V. c. 27, s. 5 (3) (*b*).

[3] 21 & 22 Vict. c. 76, s. 21.

[4] 23 & 24 Vict. c. 143, s. 38.

[5] Bell, Convey. 1004.

[6] 30 & 31 Vict. c. 97, s. 15.

[7] *Russell* v. *Russell*, 1874, 2 R. 93.

[8] 31 & 32 Vict. c. 101, s. 24.

[9] 32 & 33 Vict. c. 116.

[10] *Maconochie*, 1857, 19 D. 366.

[11] *Scott*, 1856, 18 D. 624.

561. The procedure is similar to that considered above with regard to completion of title by a beneficiary in a lapsed trust. The crave of the petition should validly describe the subjects to which title is to be completed, and should specify or validly refer to real burdens and conditions affecting them. The warrant of the Court is declared to have the effect of a conveyance in due and common form in favour of the judicial factor, granted by the person, whether in life or deceased, whose estate is under judicial management. Where the estate is that of a pupil, minor, or lunatic in whose person a title has not been made up, the warrant is declared to have the effect of a conveyance in favour of the ward or of the judicial factor, as the case may be, granted by a predecessor having a completed title, or where the estate has previously been vested in a trustee or former judicial factor, of a conveyance granted by such trustee or former judicial factor, whether in life or deceased. The title of the judicial factor or his ward may then be completed by recording the warrant of the Court with warrant of registration in the appropriate Register of Sasines.

562. The Conveyancing Act of 1874 [1] contained an improved provision under which the interlocutor appointing a new trustee or judicial factor on a trust estate, on being recorded in the appropriate Register of Sasines, operates infeftment, but the provision was restricted to cases where a trust title had already been completed and recorded and was not applicable to the completion of title of *curators bonis*, factors *loco tutoris*, or factors *loco absentis*, these officers not being expressly included in the term "judicial factor" as defined in the Act. It was necessary that the interlocutor should specify the deed constituting the trust estate and the titles by which the trust title had previously been completed. Sec. 67 of the Act repealed generally all statutes at variance with its provisions, and some doubts were expressed [2] as to whether, in consequence of this, s. 24 of the 1868 Act was not impliedly repealed. The better view, however, was that the provisions of the 1868 Act remained operative where a trust title had not been previously completed, but that recourse should be had to the provisions of the Act of 1874 where previous trustees or judicial factors, within the meaning of the Act, had already taken infeftment.

563. The Conveyancing Act of 1924,[3] however, makes the procedure of the 1874 Act available for judicial factors as defined in the 1868 Act, even in cases where the trust title has never been completed, and provides that it shall be competent in any warrant, interlocutor, or decree of Court, conferring a right to land or to a heritable security, or granting authority to complete title thereto, and also in the application to the Court, to insert a deduction of title from the person last infeft, or holding the last recorded title. It is declared that an extract of the warrant, interlocutor, or decree shall be equivalent to a disposition of land, or an assignation of a heritable security, granted by a person uninfeft, in terms of s. 3 of the Act, and on being recorded in the appropriate Register of Sasines shall have the same force and effect as such a disposition and assignation duly recorded in such register. This provision removes a difficulty which was sometimes felt under s. 24 of the 1868 Act, where authority was sought to complete title to a trust estate not feudally vest in any person.

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[1] 37 & 38 Vict. c. 94, s. 44.

[2] Hendry's Styles, p. 121.

[3] 14 & 15 Geo. V. c. 27, s. 5 (3).

SUBSECTION (3).—*Adjudgers.* See ADJUDICATION.

SUBSECTION (4).—*Under Decree of Division of Common Property.* See COMMON PROPERTY AND COMMON INTEREST.

SUBSECTION (5).—*Under Decree of Division of Glebe.* See CHURCH.

SECTION 11.—COMPLETION OF TITLE TO LANDS ACQUIRED COMPULSORILY.

564. The compulsory acquisition of lands will be dealt with under another heading,[1] and it is only necessary to consider here the completion of title of the promoters of an undertaking to lands acquired compulsorily under statutory powers, in which are incorporated ss. 67 to 82, and 120 to 126 of the Lands Clauses Act of 1845.[2] Three different sets of circumstances may arise: (1) The proprietor of the lands may delay or refuse to grant a conveyance to the promoters, or may be unable to do so in consequence of disabilities as to title or capacity;[3] (2) a conveyance in the statutory form introduced by the Act may be given; (3) an ordinary disposition may, by agreement, be granted by the proprietor in favour of the promoters.

565. In cases within the first class it is provided[4] that the promoters may expede a notarial instrument containing a description of the lands acquired, narrating the purchase and consignation of the price. This instrument, unlike other instruments, attracts an *ad valorem* conveyance on sale stamp duty. The statute declares that such instrument on being expede and stamped shall vest in the promoters all the estate and interest in such lands of the parties for whose use the price has been consigned. Apparently there is here a case of a notarial instrument which has the effect of a conveyance of lands, and which, unlike other instruments, is of some value without being recorded in the appropriate Register of Sasines. It is, however, provided that on being recorded in the manner provided for statutory conveyances, *i.e.* within sixty days of the date, such instrument shall have the same effect as a conveyance so recorded. No statutory form of notarial instrument is given, but in the case cited[5] the Court approved of an instrument which narrated the statutory powers of the promoters, the procedure for assessing compensation to the proprietor of the lands acquired, his refusal to accept the price and to grant a conveyance to the promoters, and the consignation of the price in terms of the Lands Clauses Act. The Act containing the statutory powers of the promoter, the decree arbitral under which the compensation was fixed, and the consignation receipt were produced to the notary and the instrument expede by him concluded as follows: "Whereupon this instrument is taken by in the hands of me the said notary public, under and in virtue and in terms of s. 76 of the Lands Clauses Consolidation (Scotland) Act, 1845." The testing clause contains the date when the instrument was signed by the notary, this being necessary in order that it may be apparent that the instrument was recorded within sixty days of its date.

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[1] See COMPULSORY PURCHASE, *infra.* p. 261.

[2] 8 Vict. c. 19.

[3] *Ibid.*, s. 75; *Miles* v. *North British Rly. Co.*, 1867, 5 M. 402; *Thomson* v. *North British Rly. Co.*, 1867, 5 M. 410.

[4] 8 Vict. c. 19, s. 76.

[5] *Alexander* v. *Bridge of Allan Water Co.*, 1868, 6 M. 324.

566. If a conveyance in statutory form [1] is granted in favour of the promoters of the undertaking, the title of the promoters may be completed by recording the conveyance in the appropriate Register of Sasines within sixty days of its date, the direct registration of conveyances made possible by the Titles Act of 1858 being anticipated by the Lands Clauses Act. Timeous registration is declared "to give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking and their successors and assigns, to the premises therein described, any law or custom to the contrary notwithstanding." Two statutory forms of conveyance are provided by the Act, the first appropriate where the purchase price is being paid by a capital sum, the other, where the consideration is the constitution of a "feu-duty or rent charge." The distinctive words in the statutory form of conveyance occur in the narrative clause, which narrates that the consideration paid for the conveyance is paid pursuant to the Act which authorises the compulsory acquisition, and in the dispositive clause, the lands being conveyed "according to the true intent and meaning of the said Act"; but a literal adhesion to the words of the Schedules is not required, provided that in substance the conveyance bears to be granted pursuant to the Acts recited and for the purposes thereof. Before the conveyance has the effect conferred on statutory conveyances by the Lands Clauses Act, it must, however, be recorded within sixty days of its date.[2] Where the title of the promoters of the undertaking is completed in statutory manner, no feudal relation exists or can be established between the company and the superior of the lands taken, and therefore a charter of confirmation granted by a superior to a company which had completed a statutory title under s. 80 was held null.[3]

567. A proviso to s. 80 provided that it should not be necessary for the promoters of the undertaking to complete title by registration of conveyances which contained a procuratory of resignation or precept of sasine, or which might "be completed by infeftment," the title in such cases, until recording under the statute, being regulated by the ordinary law of Scotland. Accordingly, where the parties agree, an ordinary common law conveyance may be employed instead of the statutory form, under which title may be completed in the usual manner. But if a conveyance which substantially conforms to the statutory form is not registered within sixty days, the title of the disponee is a common law and not a statutory title,[1] and where lands are acquired by voluntary agreement and not under powers incorporating the procedure of the Lands Clauses Act, the conveyance, even if recorded within sixty days of its date, does not confer a statutory title.[2]

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[1] 8 Vict. c. 19, s. 80, Schedules (A) and (B).

[2] *Heriot's Trust* v. *Caledonian Rly. Co.*, 1914 S.C. 601; 1915 S.C. (H.L.) 52.

[3] *Mags. of Elgin* v. *Highland Rly. Co.*, 1884, 11 R. 950; *Mags. of Inverness* v. *Highland Rly. Co.*, 1893, 20 R. 551. See Superior and Vassal.

SECTION 12.—COMPLETION OF TITLE BY JUDICIAL ASSIGNEES.

SUBSECTION (1).—*Trustee in Sequestration.*

568. The effect of the Act and Warrant of a trustee in sequestration is discussed under the title of SEQUESTRATION. But the vesting in the trustee in virtue of the Act and Warrant is not equivalent to infeftment in the case of heritage or to registration in the case of long leases, though it gives the trustee a real right in the case of ordinary leases and such heritable rights as do not require infeftment.[3] The trustee, however, does acquire a personal right in virtue of which he may, without completing title in his own person and without the concurrence of the bankrupt, grant valid conveyances of heritage.[4] But until infeftment is taken by the trustee or his assignee there is nothing to prevent a prior disponee or a heritable creditor completing his title prior to, and therefore to the exclusion of, the trustee, the first completed real right being preferable.[5] For this reason, and to prevent questions of accretion from arising, title should be completed in the trustee's person.[6] The provisions of the Conveyancing Act of 1924 [7] must also be kept in view under which no conveyance granted by a person whose estates have been sequestrated, or by his representatives, shall be challengeable on the ground of such sequestration if such deed shall have been granted or shall come into operation at a date when the effect of the recording, in terms of the Act, of the abbreviate of sequestration shall have expired (*i.e.* after five years), unless the trustee shall, before the recording of such a deed in the appropriate Register of Sasines, have completed his title.

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[1] *Heriot's Trust* v. *Caledonian Rly. Co.*, *supra*.

[2] *Campbell* v. *Northern District Committee of the County Council of Ayr*, 1904, 11 S.L.T. 587.

[3] *Brock* v. *Cabbell*, 1830, 8 S. 647; *Clark* v. *West Calder Oil Co.*, 1882, 9 R. 1017; *Macdowall* v. *Russell*, 1824, 2 S. 682.

[4] 3 & 4 Geo. V. c. 20, s. 100.

[5] *Cormack* v. *Anderson*, 1829, 7 S. 868; *Melville* v. *Paterson*, 1842, 4 D. 1311; *Lindsay* v. *Giles*, 1844, 6 D. 771; *Smith* v. *Frier*, 1857, 19 D. 384; *Lord Napier and Ettrick's Trs.* v. *de Saumarez*, 1900, 2 F. 882.

[6] *Miller* v. *Wright*, 1836, 14 S. 1087; *Edmond* v. *Mags. of Aberdeen*, 1855, 18 D. 47; affd. 3 Macq. 116.

[7] 14 & 15 Geo. V. c. 27, s. 44 (4) (*c*).

569. The trustee may complete his title to lands by notarial instrument in the form of Schedule O to the 1868 Act [1] or by notice of title in the form of Schedule B, Nos. 1 and 2 to the 1924 Act,[2] according as the title of the bankrupt is or is not complete, to heritable securities by instrument in the form of Schedule LL of the 1868 Act, or by notice in the form of B. No. 3, of the 1924 Act, and to long leases by instrument in the form of Schedule F to the Registration of Leases Act of 1857,[3] or by the corresponding form of notice of title.[4]

570. Where sequestration is awarded against the estate of a deceased person whose successor has completed title to his heritable estate, the Bankruptcy Act contains procedure whereby the trustee may obtain an order from the Court which vests the estate in the trustee as at the date of the first deliverance in the petition for sequestration, to the same effect as is provided in regard to the Act and warrant.[5]

571. Any estate falling to or acquired by the bankrupt after the date of his sequestration, and prior to his discharge, falls under the sequestration, even though it be the subject of a security constituted prior to the sequestration.[6] In order to complete title to such acquirenda an order from the Court is required,[7] which order has the effect of vesting the acquirenda in the trustee, as at the date of acquisition, to the same effect as is enacted with regard to the rest of the sequestrated estate. Until the title of the trustee is completed, the acquirenda are subject to the diligence of creditors whose debts have been incurred subsequent to the date of the sequestration.[8] Under the Conveyancing Act of 1924 [9] the trustee is required, within one month after the granting of a vesting order, which relates to lands or a registered lease, to record in the appropriate Register of Sasines a memorandum in the form provided by s. 44 of the Bankruptcy Act of 1913. A difficulty arises under this provision, inasmuch as the form of memorandum referred to is only appropriate for recording in the Register of Inhibitions and Adjudications, and does not refer to any specified subjects. It may be possible to comply with the provisions of the 1924 Act by inserting a specification of the subjects in the memorandum, but the prudent course would appear to be that the trustee should complete his title to the subjects by expeding and recording a notice of title.

SUBSECTION (2).—*Liquidator of Company.* See LIQUIDATION.

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[1] 31 & 32 Vict. c. 101, ss. 23 and 25.

[2] 14 & 15 Geo. V. c. 27, s. 4.

[3] 20 & 21 Vict. c. 26, s. 11.

[4] 14 & 15 Geo. V. c. 27, s. 24.

[5] 3 & 4 Geo. V. c. 20, s. 101; *Barstow* v. *Graham*, 1843, 6 D. 293.

[6] *Lord Napier and Ettrick's Trs.* v. *de Saumarez*, 1899, 1 F. 614.

[7] 3 & 4 Geo. V. c. 20, s. 98.

[8] *Grant* v. *Green's Tr.*, 1901, 3 F. 1016.

[9] 14 & 15 Geo. V. c. 27, s. 44 (4) (*b*).

SECTION 13.—COMPLETION OF TITLE TO HERITABLE SECURITIES.

SUBSECTION (1).—*Before* 1845.

572. Before 1845 [1] the creditor in a bond and disposition in security took infeftment as if he had been a disponee under a disposition. The obligation to infeft granted by the debtor was usually *a me vel de me*, but it might be either *de me* or *a me* simply. In the latter case it was necessary that the bond should contain a procuratory of resignation as well as a precept of sasine, and the creditor's title was not complete until he had entered with the debtor's superior. Accordingly where successive bonds, each with an obligation to infeft *a me*, were granted over the same subjects, the creditor who first entered had the prior security,[2] but he was liable to be postponed to a creditor who took base infeftment before his entry under a bond with a *de me* or *a me vel de me* holding.[3]

573. Where subinfeudation was prohibited and the title of the granter of the security contained only an *a me* holding, it was necessary that he should be entered with the superior before the creditor could obtain a real security.[4] In such circumstances it was a common conveyancing error for the creditor to take sasine on the precept contained in the bond without taking an entry with the superior. This left the creditor's title incomplete, for the obligation to infeft *a me* was not a warrant for base infeftment. The result was that any posterior bondholder who took an entry with the superior had a preferable right over the security subjects.

574. When the creditor was infeft, but his infeftment was unconfirmed, his heir made up title by precept of *clare constat* from the debtor as his immediate superior. If that could not be obtained, he might resort upon the alternative holding to the superior and execute the procuratory, or, to avoid the necessity of consolidating two estates, obtain confirmation of the ancestor's infeftment and precept of *clare constat*, and infeftment upon the debtor's warrant in the bond.[5]

SUBSECTION (2).—*Between* 1845 *and* 1847.

575. The Transmission of Heritable Securities Act of 1845 [1] did not alter the method of completion of title by the grantee under a bond, but provided that the creditor's heir could complete title by recording a writ of acknowledgment in statutory form granted by the person infeft in the security subjects. The title of assignees could also be completed by the direct registration of an assignation in the form scheduled to the Act or of a notarial instrument.

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[1] 8 & 9 Vict. c. 31.

[2] See *Struthers* v. *Lang*, 1826, 4 S. 418; 2 W. & S. 563; *Peebles* v. *Watson*, 1825, 4 S. 290; *Leslie* v. *M'Indoe's Trs.*, 1824, 3 S. 48.

[3] *Rowand* v. *Campbells*, 1824, 3 S. 196; 2 Ross, L.C. 16; 1827, 5 S. 903; 1830, 4 W. & S. 177.

[4] *Henderson* v. *Campbell*, 1821, 1 S. 103; 3 Ross, L.C. 306.

[5] Menzies, 885.

SUBSECTION (3).—*Between* 1847 *and* 1868.

576. The Heritable Securities Act of 1847[1] provided for the direct registration of bonds for which a statutory form was provided. This form of bond contained no clause of obligation to infeft, but registration of the bond in the appropriate Register of Sasines was declared as effectual as if such bond had contained, in the case of feudal subjects, an obligation to infeft *a me vel de me*, procuratory of resignation and precept of sasine, and in the case of burgage subjects, an obligation to infeft *more burgi* and procuratory of resignation, and had been followed by infeftment. The statutory form contained a clause of consent to registration in the appropriate Register of Sasines, and an Act of 1854[2] made it competent to insert such a clause in assignations, writs of acknowledgment, and notarial instruments. No warrants of registration were required. Unregistered assignations were also made available as warrants for completion of title of the heir of the assignee.

577. The provisions of the Titles Acts of 1858[3] and 1860[4] were applicable to completion of title to heritable securities as the term "deed" and "conveyance" in both Acts was interpreted as including heritable securities, except when the context was repugnant to such construction.

SUBSECTION (4).—*Completion of Title after* 1868. See BOND.

SECTION. 14—COMPLETION OF TITLE TO REAL BURDENS AND GROUND ANNUALS. See BURDENS : GROUND ANNUALS.

SECTION 15.—COMPLETION OF TITLE TO REGISTERED LEASES. See LEASES.

SECTION 16.—COMPLETION OF TITLE TO TERCE AND COURTESY. See COURTESY: TERCE.

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[1] 10 & 11 Vict. c. 50.

[2] 17 & 18 Vict. c. 62.

[3] 21 & 22 Vict. c. 76.

[4] 23 & 24 Vict. c. 143.

COMPOSITION.

See CASUALTIES OF SUPERIORITY.

COMPOSITION CONTRACT.

TABLE OF CONTENTS.

	PAGE
Nature and Constitution of Extra-judicial Composition Contract	248
Parties to the Contract	248
Conditions usually expressed	249
Implied Conditions	249
Proof of the Contract	250
Rights and Obligations under the Contract	250
General	250
Illegal Preferences	251
Debtor's Rights under the Contract	252
Effect of Misrepresentation or Concealment by the Debtor	252
Effect of Discharge on Cautioner for Debtor	252
Cautioner for Composition	253
Acts which release Cautioner	253
Illegal Preference to Cautioner	253
Rights of Cautioner	253
Application of Provisions as to Deeds of Arrangement	254
Composition Contract in Sequestration	254

SECTION 1.—NATURE AND CONSTITUTION OF EXTRA-JUDICIAL COMPOSITION CONTRACT.

578. A composition contract is an agreement constituted by an offer by the debtor of a portion of his debts in full discharge of his obligations, and the acceptance of his offer by his creditors.[1] In the case of a debtor whose estates have been sequestrated, the Bankruptcy (Scotland) Act of 1913 makes special provision for winding up the sequestration upon an offer of composition made by the bankrupt and accepted by the creditors with the approval of the Court; but such a composition contract differs from an extra-judicial contract in certain important particulars.[2] The extra-judicial form of settlement is frequently resorted to in cases where it is considered advisable that the debtor should be allowed to carry on his business and retain possession of his estate.[3] The method of winding up the affairs of an insolvent by means of a trust deed is more appropriate when the estate is to be handed over to, and realised by, the creditors.

SECTION 2.—PARTIES TO THE CONTRACT.

579. A composition contract may be entered into by the debtor, or by anyone on his behalf, (*a*) with one or more of his creditors as indi-

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GENERAL AUTHORITIES.—Bell, Com. ii. 398 *et seq.*; Goudy on Bankruptcy, 4th ed., p. 489 *et seq.*; Wallace on Bankruptcy, 2nd ed., p. 384 *et seq.*

[1] Bell, Com. ii. 398; Goudy on Bankruptcy, p. 489; Wallace on Bankruptcy, p. 384.

[2] See Composition Contract in Sequestration, para. 593 *infra*; Goudy on Bankruptcy, p. 489.

[3] See *Miller* v. *Downie*, 1876, 3 R. 548, per Lord Gifford at p. 553.

viduals, or (*b*) with the creditors as a body. In the former case it is termed a special composition; in the latter a general composition.[1]

The acceptance may be by any person duly authorised to represent the creditor or creditors.[2] A partner of a firm has implied power to accept a composition on behalf of his firm,[3] but not to make an offer of composition of the firm's debts to the creditors.[4] A creditor cannot resile from his acceptance pending negotiations with other creditors.[5]

SECTION 3.—CONDITIONS USUALLY EXPRESSED.

580. As the contract is purely a voluntary one, the parties may adjust its terms to suit their own views and the circumstances of the particular case. In practice, it is usual to specify the conditions as to the accession of creditors, the time and mode of payment of the instalments of composition, the finding of caution, and the granting of a discharge.[6] It is customary to stipulate that the concurrence of all the creditors must be obtained;[7] but it is sometimes provided that the composition contract shall be binding on accepting creditors, provided a certain number or proportion of the whole body of creditors concur.[6] Such a provision is necessary where some of the creditors have expressed a determination not to accede. The composition may be with, or without, security, and may be payable in one sum, or by a series of instalments. In the latter event, which is more common, the usual course is for the debtor along with the cautioner, if any, to grant bills to each of the creditors for the respective amounts of the instalments payable at the dates specified in the contract. The creditor is thus put in a position to do summary diligence against the debtor, and the cautioner (if any), for the amount of the composition, in the event of failure to pay. A trust deed is sometimes granted by the debtor to secure payment of the composition,[8] or there may be a conveyance to the creditors, or to a trustee for them, of some special asset of the debtor in addition to the composition.[9] Provision may be made for the discharge of the debtor at once, or, as is more common, on payment of the whole or part of the composition.[10]

SECTION 4.—IMPLIED CONDITIONS.

581. As the estate of an insolvent debtor is regarded in law as the common property of the creditors, and as held in trust for them by the debtor, the following conditions are, in the absence of express stipulation, implied in every composition contract between a debtor and his general creditors, viz. (1) that all the creditors be treated equally,[1] and (2) that all the creditors concur in the arrangement.[2] Apart from express agreement, each of these conditions is an essential and inherent condition of the contract between the debtor and his creditors, and violation of either of them entitles any creditor to resile from his acceptance of the offer of composition, and to insist on his full claim.

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[1] Bell, Com. ii. 398.

[2] See *Hollinworth* v. *Dunbar*, 21st January 1813, F.C.; *Henry* v. *Strachan & Spence*, 1897, 24 R. 1045.

[3] *Mains & M'Glashan* v. *Black*, 1895, 22 R. 329.

[4] Wallace on Bankruptcy, p. 385.

[5] *Annan* v. *Marshall*, 1887, 25 S.L.R. 94.

[6] Goudy on Bankruptcy, p. 490.

[7] See *Johnstone* v. *Carson*, 1823, 2 S. 229 (N.E. 203); *Brown* v. *M'Intyre*, 1830, 8 S. 847.

[8] *Miller* v. *Downie*, 1876, 3 R. 548.

[9] See *Mackinnon* v. *Monkhouse*, 1881, 9 R. 393.

[10] See *Graham* v. *Cuthbertson*, 1828, 7 S. 152.

SECTION 5.—PROOF OF THE CONTRACT.

582. The composition contract may be proved by formal deed, or holograph missives, or even by improbative writings.[3] It may, accordingly, be proved by duly authenticated minutes of a meeting of creditors, but where the creditors have not signed the minutes, it would seem necessary to establish that the creditors had been present and had intimated no dissent from the resolution, accepting the offer of composition, when read out to the meeting.[4] Mere silence, however, cannot be relied on as sufficient to bind a creditor. Thus the retention of a composition bill for ten months by a creditor, who had declined to accede to the composition, was not held to bind him to acceptance.[5] Proof by parole would not, it is thought, be allowed to set up a composition contract, as the acceptance of a composition is equivalent to a partial discharge of the debt, which should be in writing.[6]

SECTION 6.—RIGHTS AND OBLIGATIONS UNDER THE CONTRACT.

SUBSECTION (1).—*General.*

583. In accordance with the general principle which governs consensual contracts, failure to implement any of its material conditions, express or implied, makes the composition contract voidable, and entitles the creditors to resile. Accordingly, if there is failure to pay the composition or any instalment at the time agreed on, or to provide the stipulated security, the creditors may treat the contract as at an end and insist on the full amount of their claims.[7] So, insolvency (and therefore notour bankruptcy) does not cease by reason that the debtor has made an arrangement with his creditors for payment of their claims by instalments over an extended period of time.[8] But if the creditors have granted the debtor a discharge in absolute terms, as where the contract bore that the discharge was granted in respect of satisfactory bills already received, the creditors may be barred from reverting to their original position in the event of subsequent failure to pay the composition.[1] Similarly, if the accession of all the creditors or of the requisite number,[2] or the consent of a cautioner where that has been specially stipulated for,[3] be not obtained, the creditor will not be bound by the composition contract in respect of the failure of a material condition. But failure to observe the terms of the contract in non-essential details will not entitle creditors to resile, if no injury can be shewn to have resulted.[4] Where a creditor had accepted an offer of composition, but the debtor failed to grant a bill to him for the composition, he was held entitled to proceed for the recovery of the original debt, leaving the debtor to plead acceptance of the composition in reduction of the amount.[5] Contrary to the rule in a composition under a sequestration, secured creditors, in the absence of stipulation to the contrary, are entitled to a composition on the full amount of their debts without deduction of the security.[6]

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[1] *Macfarlane* v. *Nicoll*, 1864, 3 M. 237 ; *Bank of Scotland* v. *Faulds*, 1870, 42 Sc. Jur. 557 ; *Ironside* v. *Wilson*, 1871, 9 S.L.R. 73.

[2] Bell, Com. ii. 400.

[3] Bell, Com. ii. 398–9 ; Goudy on Bankruptcy, p. 491 ; *Glass* v. *M'Intosh*, 1825, 4 S. 1. See *Kilpatrick* v. *Miller*, 1825, 4 S. 80 (N.E. 82) ; *Henry* v. *Strachan & Spence*, 1897, 24 R. 1045.

[4] Bell, Com. ii. 399.

[5] *Thew & Co.* v. *Sinclair & Co.*, 1881, 8 R. 467.

[6] Goudy on Bankruptcy, p. 491 ; Bell, Com. ii. 398–9 ; *Henry* v. *Strachan & Spence*, 1897, 24 R. 1045.

[7] *Horsefall* v. *Virtue & Co.*, 1826, 5 S. 33 ; *Callon* v. *Shanks*, 1851, 14 D. 41 ; *Woods, Parker & Co.* v. *Ainslie*, 1860, 22 D. 723. See *Alexander* v. *Yuille*, 1873, 1 R. 185.

[8] *Neil's Trs.* v. *British Linen Co.*, 1898, 36 S.L.R. 139 ; Wallace on Bankruptcy, p. 387.

SUBSECTION (2).—*Illegal Preferences.*

584. It is illegal for a debtor to come under a secret obligation to give one of his creditors a preference in order to induce him to accede to the composition. Such a bargain is treated as a *pactum illicitum*, and an action will not lie for its enforcement.[7] A third party, who is the party to the illegal preference, is, equally with the creditor, barred from recovering the amount from the debtor. Thus, when a bank, in the knowledge of a composition settlement between the debtor and his creditors, discounted a promissory note which conferred an illegal preference on the creditor, it was held that the bank could not sue on the note.[8] When, however, a debtor assigned an interest in a lease of uncertain value to a creditor in consideration of the latter advancing the amount required to pay a composition to the whole creditors the transaction was upheld.[9]

585. The preference may be challenged by (*a*) the debtor,[10] (*b*) any creditor,[7] (*c*) the cautioner for the debtor,[11] or (*d*) the trustee in a supervening sequestration.[12] But it is essential to shew that the preference was given to obtain the creditor's consent to the composition. Thus, a voluntary payment, which the debtor could not have been forced to make, made after discharge, or made before discharge under circumstances unconnected with any attempt to obtain the creditors' consent to the composition, is not open to challenge.[1] A private undertaking by the debtor to pay a certain consideration to a creditor, out of future acquisitions, for his concurrence would probably be held invalid as being contrary to the true spirit of the contract made with the creditors.[2]

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[1] *Graham* v. *Cuthbertson*, 1828, 7 S. 152.

[2] *Johnstone* v. *Carson*, 1823, 2 S. 229 (N.E. 203); *Brown* v. *M‘Intyre*, 1830, 8 S. 847.

[3] *Neil* v. *Inglis*, 1833, 12 S. 162.

[4] See *Robertson* v. *Ferguson*, 1820, 2 Mur. 303, per Ch. C. Adam.

[5] *Dick* v. *Murison*, 1845, 8 D. 1.

[6] Goudy on Bankruptcy, p. 489; *Macbride* v. *Stevenson*, 1884, 11 R. 702.

[7] Bell, Com. ii. 399.

[8] *Bank of Scotland* v. *Faulds*, 1870, 42 Jur. 557.

[9] *Hay* v. *Rafferty*, 1899, 2 F. 302.

[10] *Mack* v. *Jenkin*, 25th November 1814, F.C.; *Arrol* v. *Montgomery*, 1826, 4 S. 499 (N.E. 504).

[11] *Arrol* v. *Montgomery*, *supra*.

[12] *Macfarlane* v. *Nicoll*, 1864, 3 M. 237.

SUBSECTION (3).—*Debtor's Rights under the Contract.*

586. On the debtor fully implementing his part of the contract, he is entitled to a discharge from the creditors and to delivery of the document of debt.[3] In the event of a discharge being given prior to payment of the whole instalment of the composition, the creditor should retain the document of debt, and, as above mentioned, if there is any failure to pay the whole instalments he may proceed with diligence for the full balance of the original amount of the debt, unless barred by the terms of the discharge.[4] The debtor retains the possession and control of his estate, unless he has agreed to hand it over to his creditors, or to manage it subject to their supervision.[5] As above explained, he is entitled to recover any sums which he may have paid in respect of an illegal preference.

SUBSECTION (4).—*Effect of Misrepresentation or Concealment by the Debtor.*

587. There is a duty on the debtor of full disclosure, both as regards the amount of his estate and the extent of his insolvency. Any wilful and material misrepresentation or concealment on his part with regard to either of these matters will render his contract voidable, and will entitle the creditors, even after granting a full discharge, to set up the original debt.[6]

SECTION 7.—EFFECT OF DISCHARGE ON CAUTIONER FOR DEBTOR.

588. Where a creditor grants a discharge to the debtor under a composition contract, the cautioner, if any, for the debt, is thereby freed, unless the consent, express or implied, of the cautioner to remaining bound has been obtained, or unless the cautioner has failed to pay the debt and claim against the debtor when called upon by the creditor to do so, or unless the contract expressly saves the right of relief.[7] But a discharge under a composition does not apparently release one who is bound as a co-principal, when he has had no notice, if such co-obligant is himself insolvent, and not ready to pay the debt.[1]

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[1] *Macfarlane* v. *Nicoll, supra*; *Ironside* v. *Wilson*, 1871, 9 S.L.R. 73.

[2] Bell, Com. ii. 399; Goudy on Bankruptcy, p. 493.

[3] Bell, Com. ii. 400; Goudy on Bankruptcy, p. 493.

[4] Goudy on Bankruptcy, p. 494.

[5] See *Scott* v. *Campbell*, 1834, 12 S. 447.

[6] Goudy on Bankruptcy, p. 493. See *Baillie* v. *Young*, 1837, 15 S. 893 (discharge in a sequestration).

[7] Bell, Com. i. 376; Goudy on Bankruptcy, p. 494; *Smith* v. *Ogilvie*, 1821, 1 S. 159 (N.E. 152); affd. 1825, 1 W. & S. 315; *Fleming* v. *Wilson*, 1823, 2 S. 336 (N.E. 296). See also *Morton Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72.

SECTION 8.—CAUTIONER FOR COMPOSITION.

SUBSECTION (1).—*Acts which release Cautioner.*

589. In the case of an extra-judicial composition settlement, caution is not necessary, but is not unusual, especially with regard to the later instalments.

A material alteration on the terms of the contract, agreed to by the creditor without the consent of the cautioner, may free the cautioner.[2] The cautioner is not released by the subsequent sequestration of the debtor by the creditors for non-payment of the composition,[3] or by the creditors ranking in the sequestration for the full amount of their debts,[4] or by their consenting to the debtor's discharge therein.[5]

SUBSECTION (2).—*Illegal Preference to Cautioner.*

590. If the cautioner is also a creditor, he is barred, under the general rule applicable to creditors, from receiving any such unfair preference as will not only relieve him of his cautionary obligation but provide payment of his debt.[6]

SUBSECTION (3).—*Rights of Cautioner.*

591. The cautioner for the composition has all the ordinary rights of a cautioner, including right of relief as against the debtor,[7] and right, on paying the debts, to an assignation from the creditors of their diligence, to enable him to operate his relief.[7]

He is at liberty to accept an assignation from the debtor of the whole or part of his estate in consideration of his undertaking responsibility as cautioner.[8] When a creditor becomes cautioner and his personal debt is not paid, he is entitled to rank on the debtor's sequestrated estate for the full amount of his debt, as well as for the amount paid out by him under his cautionary obligation.[9] A cautioner for the composition has also right to set aside an illegal preference granted to a creditor.[10]

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[1] Goudy on Bankruptcy, p. 494; *Calder* v. *Borthwick*, 1829, 7 S. 840.

[2] Bell's Prin., s. 263; *Scott* v. *Campbell*, 1834, 12 S. 447. See *Clerk* v. *Russell*, 1825, 3 S. 541 (N.E. 374); *Allan, Buckley, etc.* v. *Pattison*, 1893, 21 R. 195.

[3] *Freeland* v. *Finlayson*, 1823, 2 S. 389 (N.E. 344); *Muir* v. *Scott*, 1825, 4 S. 252 (N.E. 257); *Thomson & Craig* v. *Latta*, 1863, 1 M. 913.

[4] *Thomson & Craig* v. *Latta*, *supra*.

[5] Bankruptcy Act, 1913, s. 52.

[6] *Robertson* v. *Ainslie's Trs.*, 1837, 15 S. 1299. See *Wood* v. *Barker*, 1865, 1 Eq. 139, and *Hay* v. *Rafferty*, 1899, 2 F. 302.

[7] Bell's Prin., s. 255.

[8] *Robertson* v. *Ainslie's Trs.*, *supra*. See *Hay* v. *Rafferty*, *supra*; Goudy on Bankruptcy, p. 496; cp. *Eaglesham* v. *Grant*, 1875, 2 R. 960, and *Stott* v. *Fender & Crombie*, 1878, 5 R. 1104.

[9] *Paul* v. *Black*, 19th December 1820, F.C.

[10] *Arrol* v. *Montgomery*, 1826, 4 S. 499 (N.E. 504).

SECTION 9.—APPLICATION OF PROVISIONS AS TO DEEDS OF ARRANGEMENT.

592. The provisions of the Bankruptcy Act, 1913, relative to Deeds of Arrangement extend to settlements or arrangements by way of composition.[1]

SECTION 10.—COMPOSITION CONTRACT IN SEQUESTRATION.

593. Under this mode of winding up a sequestration, the bankrupt or his friends may offer a composition to the creditors on the whole debts, with caution for payment of the same. If the offer is accepted by the creditors by the requisite votes in number and value, and the Court approves, the bankrupt obtains retrocession of his estate and is discharged except as regards the payment of the composition. The offer of composition must extend to all the bankrupt's debts, whether claims have been lodged or not. Caution for the whole composition must be given. On failure to make payment of the composition, the original debts do not revive as in the case of extra-judicial composition. It is necessary for the creditors to deduct any security held by them, whereas in an extra-judicial composition agreement, apart from stipulation, the composition is payable on the full debt without deduction of a security.[2]

The procedure applicable to composition contracts in sequestrations is regulated by the Bankruptcy Act, 1913, and the subject will be found treated at length under the head of SEQUESTRATION.

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[1] Bankruptcy Act, 1913, s. 34.

[2] Goudy on Bankruptcy, 4th ed., p. 489.

COMPRISING.

See ADJUDICATION.

COMPROMISE.

TABLE OF CONTENTS.

	PAGE		PAGE
General	255	Who may Compromise (*continued*)—	
Proof of Compromise	256	Parties	258
Who may Compromise	257	Compromise in Bankruptcy . .	258
Capacity to Compromise . .	257	Compromise by Company . .	259
Counsel	257	Compromise by Trustees . .	259
Agents	258	Compromise of Claim to Workmen's Compensation	260

Section 1.—General.

594. Compromise or transaction is an agreement between parties for the settlement, by mutual concession, of doubtful claims. "A proper transaction must imply the doubtful event of a plea: and therefore when parties commune, and come to an agreement, by clearing the point of right in their claim on either side, though either party pass from much they claimed, there is no transaction, albeit thereby the vexation of a plea be shunned: for it is more the uncertain event, than the trouble of legal process, that makes a transaction."[1] Compromise of a *bona fide* claim does not depend for its validity upon the soundness in fact or law of the claim or defence. "The real consideration is not the sacrifice of a right, but the abandonment of a claim."[2]

595. "If payment has been made by way of transaction or compromise, 'fairly entered into with full disclosure and good faith,' it is not revocable on the ground of error because the transaction is an independent obligation, and the Court will be slow to disturb the quiet which is the result of the agreement. To invalidate such a settlement, to recover back a payment so made, mere mistake of law is not enough; it must be shewn not merely that the payment was not originally due, but that the compromise was procured by unfair means."[3] Such an agreement is the most difficult of any to overturn.[4] It cannot be set aside on the

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General Authorities.—Bankt. i. 23, 1; Kames, Equity, 181, 365; Mackay, Manual, 25, 36, 407, 544, 575; Practice, i. 113, 133; ii. 143, 377, 419; Maclaren, Court of Session Practice, 28, 168, 204, 230, 233, 284, 431; Law of Compromises and Family Arrangements, Edwards and Watmough, 1925.

[1] Stair, i. 17, 2.

[2] *Trigge* v. *Lavallée*, 1863, 15 Moore P.C. 292. See also The Law relating to Compromises (1925), Edwards and Watmough, p. 5.

[3] Bell's Prin., s. 535.

[4] *Stewart* v. *Stewart*, 1836, 15 S. 112.

ground that a party was in error as to his legal rights.[1] But it has been held in England that where owing to a mutual mistake a written agreement fails to express the real bargain between the parties the Court has jurisdiction to rectify the mistake.[2]

596. If, however, there has been fraudulent misrepresentation or fraudulent concealment a compromise may be reduced.[3] Where, in the winding up of a company, subject to the supervision of the Court, it was found, while matters were entire, that the sanction of the Court to a compromise between the liquidator and a creditor of the company had been obtained without the Court being informed of a material fact (although non-disclosure was without fraudulent intent), the decree sanctioning the compromise was held to be reducible.[4] Unfairness of conduct by a party to a dispute, whereby he obtains the consent of the other party to a compromise, is a ground of legal relief, but it does not render the transaction or compromise void *ab initio*.[5]

SECTION 2.—PROOF OF COMPROMISE.

597. Compromise of an action, like all compromises regarding moveables, may be proved *pro ut de jure*.[6] It has also been held that a probative writ is not necessary to prove the compromise of an action providing, *inter alia*, for a purchase at a certain price of certain heritage,[7] and that an action regarding heritage was compromised by letters signed by the agents for the parties duly authorised, although the letters were not holograph or tested.[8] Where parties to a litigation have settled it, the settlement is binding although the authority of the Court has not been interponed.[9] Agreements to refrain from serving an action and from lodging defences have also been held binding.[10] On the other hand, the pursuer, a widow, in an action for reparation has been held entitled to resile from a compromise where there was no allocation of damages in respect of her husband's death between her and her pupil children in the Minute of Tender.[11] Terms of compromise settled by duly signed joint minute cannot, however, be varied by parole evidence.[12]

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[1] *Johnston* v. *Johnston*, 1859, 3 Macq. 619; *Kippen* v. *Kippen's Tr.*, 1874, 1 R. 1171.

[2] *Craddock Bros.* v. *Hunt*, [1923] 2 Ch. 136; *United States* v. *Motor Trucks Ltd.*, [1924] A.C. 196.

[3] *Dempsters* v. *Raes*, 1873, 11 Macph. 843; *Ex parte Banner*, 1881, 17 Ch. D. 480; *Assets Co., Ltd.* v. *Guild*, 1885, 13 R. 281.

[4] *D. & W. Henderson & Co.* v. *Stewart*, 1894, 22 R. 154.

[5] The Law of Compromises, *supra*, chap. viii.

[6] Dickson on Evidence, s. 564; *Thomson* v. *Fraser*, 1868, 7 M. 39; *Love* v. *Marshall*, 1872, 10 M. 795; *Dobie* v. *Lauder's Trs.*, 1873, 11 M. 749.

[7] *Torbat* v. *Torbat's Tr.* (O.H.), 1906, 14 S.L.T. 830.

[8] *Anderson* v. *Dick*, 1901, 4 F. 68.

[9] *Gow* v. *Henry*, 1899, 2 F. 48. See also *Dewar* v. *Ainslie*, 1892, 20 R. 203.

[10] *Christie* v. *Fife Coal Co.*, 1899, 2 F. 192.

[11] *Murphy* v. *Smith*, 1920 S.C. 104.

[12] *Hamilton* v. *Baird & Lewis*, 1893, 21 R. 120.

SECTION 3.—WHO MAY COMPROMISE.

SUBSECTION (1).—*Capacity to Compromise.*

598. Tutors, curators, trustees and judicial factors have power to compromise doubtful claims and actions.[1] Corporations, however, acting under statutory powers, cannot compromise so as to deprive themselves in future of the right to exercise these powers.[2] A mandatary cannot without special authority settle a case.[3]

SUBSECTION (2).—*Counsel.*

599. Compromise of an action is within the presumed mandate of counsel. It is no doubt proper that he should obtain the express instructions of his client, or at all events of his agent, before taking a step so decisive, but that is not necessary in order to bind the client in a question with the opposite party.[4] Counsel is entitled to exercise his own discretion in settling or abandoning an action. An allegation by a client that he has sustained loss in consequence has been held not relevant to support a claim of damages against the counsel.[5] It is doubtful, in view of some recent English decisions, if such an extreme view of counsel's powers to compromise could now be maintained,[6] and in the most recent case,[7] Bankes L.J., quoting Lord Coleridge in *Little* v. *Spreadbury*, said: "My view of the law is this: 'where a client has given specific instructions for a compromise or has given a prohibition against compromising except in certain terms the solicitor—and the same would apply to counsel—has no authority from the client to depart from these instructions without the client's consent express or implied." Broadly, the the rule would seem to be that power to compromise may be implied in counsel's mandate, but no counsel can bind his client by compromising in defiance of the client's wishes. The proper course for counsel to take when the client declines to follow his advice is to withdraw from the case. Counsel's powers are, however, limited to judicial or forensic acts in the conduct of the cause, and he has no power to make a compromise involving matters collateral to, or outwith the subject-matter of the action.[8] (See ADVOCATE.)

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[1] Trusts Acts, 1867, 30 & 31, Vict. c. 97, s. 2; 1884, 47 & 48 Vict. c. 63, s. 2; 1921, 11 & 12 Geo. V. c. 58, s. 4 (i) ; M'Laren on Wills and Succession.

[2] *York Corpn.* v. *Leetham & Sons*, [1924] 1 Ch. 557; Law relating to Compromises, *supra*, p. 44.

[3] Maclaren, Practice, p. 431 ; *Thoms* v. *Bain*, 1888, 15 R. 613.

[4] *Duncan* v. *Salmond*, 1874, 1 R. 329 ; *Matthews* v. *Munster*, 1887, 20 Q.B.D. 141, at p. 143.

[5] *Batchelor* v. *Pattison and Mackersy*, 1876, 3 R. 914.

[6] *Neale* v. *Gordon-Lennox*, [1902] A.C. 465; cf. *Little* v. *Spreadbury*, [1910] 2 K.B. 658.

[7] *Shepherd* v. *Robinson*, [1919] 1 K.B. 474 ; *Hendry* v. *Hendry*, 1916, 1 S.L.T. 208, at p. 211; 1916, 2 S.L.T. 135.

[8] Law of Compromises, *supra*, p. 76 ; *Swinfen* v. *Swinfen*, 1856, 25 L.J. C.P. 303 ; 1857, 26 L.J. C.P. 97 ; 1858, 27 L.J. Ch. 491 ; *Swinfen* v. *Chelmsford*, 1860, 29 L.J. Ex. 382 ; *Mackintosh* v. *Fraser*, 1860, 22 D. 421 ; *Strauss* v. *Francis*, 1866. L.R. 1 Q.B. 379 ; *Duncan*, *supra* ; *Wauchope* v. *North British Rly. Co.*, 1863, 2 M. 326 ; *Hendry*, *supra*.

SUBSECTION (3).—*Law Agents.*

600. A law-agent may be liable in damages if he gives up or compromises a case without instructions. But the law in Scotland on this point has never been definitely decided. The general trend of recent English and American decisions has been that where the client has given no express instructions as to the terms of compromise, or against compromising, the law agent can enter into a compromise on behalf of his client. If, however, the client has qualified his mandate to his solicitor in any way as to compromise, the solicitor must act within that mandate. Where counsel has been instructed, the law agent is in all cases protected if he acts upon the advice of counsel.

SUBSECTION (4).—*Parties.*

601. Where a case has been compromised by the parties without any provision being made as to expenses, the Court will not thereafter deal with them.[1] A client cannot, by settling with his adversary behind the back of his agent, deprive the latter of his right to get decree for expenses against the adverse party in cases where expenses have actually been found due, or where they follow as a consequence of interlocutors previously pronounced, or where the transaction is a collusive one intended to defeat the agent's rights.[2]

SECTION 4.—COMPROMISE IN BANKRUPTCY.

602. By Section 172 of the Bankruptcy (Scotland) Act, 1913,[3] a trustee in bankruptcy may, with the consent of the commissioners, compound and transact, or refer any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon, and the compromise, transaction, or decree arbitral shall be binding on the creditors and the bankrupt. Where a trustee is *qua* trustee a claimant on another sequestrated estate he may with such consent enter into a composition settlement.[4] A creditor cannot insist on carrying on a litigation which the trustee and the commissioners have compromised,[5] but a compromise by the trustee without the commissioners is *ultra vires*, and powers of compromising are always subject to the control and direction of the creditors, and to appeal.[6] Section 53 of the Act provides that no transaction can be entered into by the trustee and commissioners so as to bind the creditors personally to pay money.

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[1] *Dobie* v. *M'Farlane*, 1856, 18 D. 1043.

[2] Maclaren, Expenses, 265, 267, 353, 513, 514; *M'Lean* v. *Auchinvole & Cuthbertson*, 1824, 3 S. 190; *Murray* v. *Kyd*, 1852, 14 D. 501; *Macqueen* v. *Hay*, 1854, 17 D. 107; Smith, Expenses, 194.

[3] 3 & 4 Geo. V. c. 20, s. 172.

[4] *Sheriff*, 25th May 1811, F.C.

[5] *Dalzell* v. *Denniston*, 1876, 4 R. 222; cf. *Caledonian Rly. Co.* v. *Watt*, 1875, 2 R. 917; *Edgar* v. *Kennedy & Hutton's Tr.*, 1905, 7 F. 452; *Marshall & Aitken* v. *Campbell's Tr.*, 1889, 16 R. 895; *Douglas* v. *MacLachlan*, 1881, 8 R. 470.

[6] *Dennistoun* v. *Dennistoun's Tr.*, 1863, 1 M. 869.

SECTION 5.—COMPROMISE BY COMPANY.

603. Where a compromise or arrangement is proposed between a company and its creditors or members, the Court may, on the application in a summary way of the company, or a creditor, or a member, direct a meeting of the creditors or members, as the case may be, to be summoned in such manner as the Court directs.[1] The chief test of the validity of a compromise or arrangement, provided that the statutory three-fourths majority in value of the shareholders has been secured, is whether the scheme approves itself to a reasonable business man as fair and reasonable. There are many cases illustrating the type of arrangements or schemes which the Court will sanction.[2] Where objection was taken to the competency of a petition presented by the directors of a company (1) to order meetings of the company and the debenture shareholders for approval of a proposed scheme, and (2) to sanction the scheme if approved at these meetings, on the ground that the company had not been consulted as to the proposed agreement, it was held that the petition was competent in view of the wide powers conferred on the directors in virtue of the articles and memorandum of association.[3]

604. In the winding up of a company, the liquidator, if the winding up be subject to supervision, with the sanction of the Court, or in the case of a voluntary liquidation with the sanction of an extraordinary resolution of the Company, may make any compromise or arrangement with creditors, and he may compromise all debts or claims.[4] Liquidators cannot be compelled to accept a proposed compromise by a contributory, but, on the other hand, a compromise is not binding until it has been sanctioned.[5]

SECTION 6.—COMPROMISE BY TRUSTEES.

605. By virtue of the Trusts Acts trustees have power to compromise or to submit and refer all claims connected with the trust-estate.[6] Numerous cases have arisen involving the question of the power of trustees to compromise, but generally this point has been merely subsidiary in considering the duties of trustees generally *quoad* the management and administration of the trust-estate. Lord Kincairney was of opinion that prior to the passing of the Trusts Acts a *curator bonis* had, at common law, power to compromise claims relating to the ward's moveable estate.[1] It is doubtful whether trustees can compromise claims at the instance of one of their number,[2] but trustees, creditors of a company, have been held entitled to enter into an arrangement by way of compromise of their debt with the liquidators.[3]

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[1] Companies Consolidation Act, 1908; 8 Edw. VII. c. 69, s. 120.

[2] *Edinburgh American Land Mortgage Co., Ltd.* v. *Lang's Trs.*, 1909 S.C. 488; *Balmenach Glenlivet Distillery*, 1916 S.C. 639; *Shandon Hydropathic Co.*, 1911 S.C. 1153; *Wright* v. *Greig, Ltd.*, 1910, 1 S.L.T. 353; Wilton, Company Law and Practice in Scotland, p. 215 *et seq.*

[3] *Bruce Peebles & Co.* v. *Bain & Co.*, 1918 S.C. 781.

[4] 8 Edw. VII., c. 69, s. 214.

[5] *Tennent* v. *City of Glasgow Bank*, 1879, 6 R. 972; *Reid & Laidlaw, Ltd.* v. *Reid*, 1905, 7 F. 457; Wilton, Company Law and Practice in Scotland, p. 364 *et seq.*

[6] Para. 598, *supra*.

SECTION 7.—COMPROMISE OF CLAIM TO WORKMEN'S COMPENSATION.

606. In workmen's compensation cases an agreement between the employer and the workman to settle all claims by payment of a lump sum is of no effect until recorded in the manner prescribed by s. 24 of the Workmen's Compensation Act, 1925.[4]

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[1] *Scott* v. *Craig's Representatives,* 1897, 24 R. 462 ; and cf. *Anderson, Petr.*, 1855, 17 D. 596.

[2] *Lawrie* v. *Lawrie's Trs.,* 1892, 19 R. 675.

[3] *City of Glasgow Bank* v. *Geddes' Trs.,* 1880, 7 R. 731.

[4] 15 & 16 Geo. V. c. 84, s. 24 ; *Russell* v. *Rudd,* [1923] A.C. 309 ; *Ware* v. *Whitlock,* [1923] 2 K.B. 418 ; Elliot, Workmen's Compensation, 9th ed., pp. 382–384.

COMPULSORY PURCHASE.

TABLE OF CONTENTS.

PAGE

Part I.—Introductory. . 262

Part II.—The Lands Clauses Acts.

- Scheme and Objects of Acts . . 263
- Purchase by Agreement . . . 265
  - General 265
  - Persons under Disability . . 265
  - Lands for Extraordinary Purposes . 266
  - Rights arising on Abandonment of Undertaking 267
- Purchase otherwise than by Agreement 267
  - Subscription of Capital . . . 267
  - Other Limitations on Exercise of Compulsory Powers . . 268
- Notice to Treat 268
  - Nature and Effect of Notice . . 268
  - Part of a House under Section 90 . 270
  - Requisites of Notice and Service . 270
  - Persons entitled to receive Notice . 271
  - Abandonment of Notice . . 271
- How Price ascertained and Compensation assessed. . . . 272
  - General 272
  - Sheriff's Award 273
  - Arbitration 273
  - Jury Trial 275
  - Valuation in Case of Absent Parties 277
  - Review of Assessment . . . 278
- Interests to be Compensated . . 278
  - General 278
  - Owners 279
  - Tenants 279
  - Bondholders 281
  - Superiors and Creditors . . 282
  - Persons having Rights of Commonty 283
  - Persons Injuriously Affected . . 284
- Basis of Assessment 287
- Acquisition of Water, Water Rights, and Servitudes 288
  - Water 288
  - Servitudes 289
- Acquisition of Minerals 290
  - General 290
  - The Mining Code 291
  - Compensation under the Mining Code 293
  - Substituted Code for Railways . 294
- Application of Compensation . . 296
  - Persons under Disability . . 296

Application of Compensation (*contd.*)— PAGE

  - Recalcitrant and Absent Persons . 299
  - Expenses in Connection with Consigned Money . . . 300
- Conveyances 301
- Entry on Lands 303
  - Conditions of Entry . . . 303
  - Entry of Consent . . . 304
  - Entry on Payment . . . 304
  - Entry for Purposes of Survey, etc. . 304
  - Entry before Compensation fixed . 305
  - Penalties for Unlawful Entry . 306
  - Warrant to take Possession . . 306
- Intersected Lands 306
- Apportionment between Landlord and Tenant 307
- Interests Omitted to be Purchased . 308
- Superfluous Lands 308
- Assessments on Undertaking . . 311
- Proceedings under the Act . . 311
- Accommodation Works, etc. . . 312

Part III.—Acquisition of Land (Assessment of Compensation) Act, 1919.

- General 312
- Assessment of Compensation . . 313
- Procedure before Official Arbiter . 314
- Costs and Notice of Claim . . 315
- Review 316
- Exclusion of Official Arbiter . . 316
- Summary of Changes Effected . . 317

Part IV.—Statutory Modifications of the Clauses Acts.

- The Defence Acts 318
- The Military Lands Acts . . . 318
- Admiralty Lands and Works . . 319
- The Post Office 319
- Defence of the Realm (Acquisition of Land) Acts 319
- The Development Commissioners . 320
- Forestry 320
- Land Settlement 321
- Small Landholders Acts . . . 321
- Local Authorities 321
  - Town Councils 321
  - Public Health Authorities and County Councils . . . 322
  - Education Authorities . . . 322

TABLE OF CONTENTS (*continued*).

Local Authorities (*continued*)— PAGE
- Parish Councils 322
- Other Authorities 323

Housing 323
- Obstructive Buildings 323
- Reconstruction and Improvement Schemes 324

Housing (*continued*)— PAGE
- Acquisition of Land for Houses . 324
- General Provisions 325

Town Planning 325

Allotments 327

Trading Undertakings 327

PART I.—INTRODUCTORY.

607. The power to acquire land compulsorily is a statutory power which has been conferred in varying circumstances for at least a couple of centuries. No right exists even under the exercise of the royal prerogative to acquire land compulsorily independently of statute.[1] Public necessity and public convenience supply the grounds upon which the Legislature thinks fit to confer this power.[2] In the case of Government Departments and Local Authorities powers of compulsory purchase are sometimes given by public-general statutes, to be exercised in stated circumstances as and when required. In other cases such powers are obtained only by special Act, to be exercised for a defined object and within a limited period of time.

608. Powers of compulsory purchase are in general put into operation under the provisions of the Lands Clauses Acts. Where, however, such powers are exercised by a Government Department or any local or public authority any question of disputed compensation or any question of apportionment of rent under a lease falls to be determined under the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919. With the Lands Clauses Acts must be read certain provisions of other Clauses Acts such as the Railways Clauses Acts, the Waterworks Clauses Acts, the Markets Clauses Acts, the Harbours Clauses Acts, the Gasworks Clauses Acts, the Electric Lighting Clauses Acts, and the Cemeteries Clauses Act, in the cases of the respective undertakers to whom these statutes relate. Modifications of certain of the provisions of the Lands Clauses Acts have also been made by public-general statutes giving power to Government Departments or local authorities to acquire land for particular purposes, *e.g.* for housing, roads, forestry, etc. These cases are considered later. But the Lands Clauses Acts may be said to provide the basis of the modern law of compulsory purchase, and in cases where compulsory powers are obtained by railway companies, electricity power companies, and other undertakers who are not Government departments or local or public authorities, they apply generally without modification.

General Authorities.—Deas, Law of Railways in Scotland; Rankine, Law of Land-Ownership; Cripps, Law of Compensation; Browne and Allan, Law of Compensation.

[1] *Att.-Gen.* v. *De Keyser's Royal Hotel*, [1920] A.C. 508.

[2] *Cf.* Ersk. Inst. i. 1, 2.

609. Accordingly, it will be convenient to examine the subject of compulsory purchase under the separate headings of—I. The Lands Clauses Acts, including therein the relevant provisions of the other Clauses Consolidation Acts above referred to; II. the Acquisition of Land (Assessment of Compensation) Act, 1919, and III. other Statutory Enactments dealing with the Compulsory Acquisition of Land. Powers are sometimes given to local authorities to acquire the business and assets of statutory undertakers operating within their district. A consideration of these powers and their exercise does not, however, fall within the scope of this article.[1] The Acquisition of Land (Assessment of Compensation) Act, 1919, does not apply to the purchase of statutory undertakings.[2]

PART II.—THE LANDS CLAUSES ACTS.

SECTION 1.—SCHEME AND OBJECTS OF ACTS.

610. The leading Scottish statute is the Lands Clauses Consolidation (Scotland) Act, 1845.[3] This statute is amended by the Lands Clauses Consolidation Acts Amendment Act, 1860,[4] which also amends the Lands Clauses Consolidation Act, 1845, applicable to England. By the Interpretation Act, 1889, the expression "Lands Clauses Acts" means, as respects Scotland, the Lands Clauses Consolidation (Scotland) Act, 1845, and the Lands Clauses Consolidation Acts Amendment Act, 1860, and any Acts for the time being in force amending the same.[5]

611. The scheme and objects of the Lands Clauses Acts are to prescribe the general conditions under which land may be acquired for public or quasi-public purposes, and the mode in which the acquisition is to be carried out, and the purchase-money or compensation ascertained and disposed of. Authority to take or purchase the particular lands in question is given by the joint operation of the general statute and of the special Act, which defines the lands liable to be taken (generally by reference to deposited plans and books of reference), and incorporates the whole or portions of the Lands Clauses Acts. As the preamble to the Act of 1845 indicates, the Act itself merely embodies in one code sundry provisions which were, prior to the Act coming into operation, set forth *ad longum* in Acts authorising the acquisition of land.

612. It is usual for the special Act specifically to incorporate the Lands Clauses Acts or some portion thereof, but as the Act of 1845 declares[6] that it shall apply to every undertaking authorised by subsequent Act which shall authorise the taking of lands and shall be incorporated with such Act, it would seem that in the absence of any indication in the special Act as to incorporation or the extent of incorporation, the Lands

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[1] See ELECTRICITY, GAS, TRAMWAYS, etc.

[2] 9 & 10 Geo. V. c. 57, s. 10.

[3] 8 & 9 Vict. c. 19.

[4] 23 & 24 Vict. c. 106.

[5] 52 & 53 Vict. c. 63, s. 23 (*b*).

[6] Sec. 1.

Clauses Acts would apply in their entirety.[1] The provisions of the Act of 1845 are divided into separate portions, each falling under a separate descriptive heading, and the Act authorises the inclusion in the special Act of some portion only of its provisions.[2] Where the special Act incorporates only a portion of the Act of 1845, described with reference to its descriptive heading, *e.g.* "the provisions with respect to the purchase and taking of lands otherwise than by agreement," or the Act, with the exception of these provisions, all the sections forming part of that portion of the Act fall to be included or excluded, as the case may be, without a critical examination of whether their provisions, strictly speaking, fall within the descriptive heading or not.[3] Where the special Act incorporates the Lands Clauses Acts, even although the special Act makes special provision for compensation in certain cases, compensation may be recovered in other cases, unprovided for in the special Act, under the general provisions of the Lands Clauses Acts.[4]

613. The Lands Clauses Consolidation (Scotland) Act, 1845, apart from its preliminary and interpretative sections, is divided by descriptive headings, thus—

Purchase of lands by agreement (ss. 6–16).
Purchase of lands otherwise than by agreement (ss. 17–66).
Application of compensation (ss. 67–79).
Conveyances (ss. 80–82).
Entry on lands (ss. 83–90).
Intersected lands (ss. 91 and 92).
Common lands (ss. 93–98).
Lands in mortgage (ss. 99–106).
Lands subject to rent charges (ss. 107–111).
Lands subject to leases (ss. 112–116).
Interests omitted to be purchased (ss. 117–119).
Sale of superfluous lands (ss. 120–127).
Notices (ss. 128 and 129).
Recovery of penalties (ss. 130–141).
Access to special Act, etc. (ss. 142–144).

614. "The division of the Lands Clauses Act into parts is not logical or precise but the reverse"[5] Thus sections 15 and 16 of the Act which relate to the compulsory taking of land appear under the descriptive heading relating to purchase by agreement. Section 90 of the Act, which enacts that no person shall be required to sell part of a building if he is willing and able to sell the whole property, belongs to the chapter dealing with compulsory purchase but appears under the head of entry on lands. Section 116, providing a limit of time for the exercise of compulsory powers, finds a place among provisions with respect to lands subject to leases. Section 126, which relates to rights of superiority, comes under "Sale of superfluous lands" instead of under "Lands subject to rent-charges," where other provisions with reference to superiorities are to be found. Section 127, dealing with the obligation of promoters to make good any deficiency of land tax, poor rate, and prison assessment is also to be found along with provisions with regard to superfluous lands. And sections 138 and 139, excluding review and allowing a limited appeal to the sheriff, though found in a *fasciculus* of sections dealing with penalties, have been held to be of general application.[1] In what follows the sequence of the statute is not strictly observed.

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[1] *In re Cherry*, 1862, 31 L.J. Ch. 351, per Lord Westbury; *In re Wood's Estate*, 1886, 31 Ch. D. 607.

[2] Sec. 5.

[3] *Ferrar* v. *Commissioners of Sewers of London*, 1869, L.R. 4 Ex. 227.

[4] *Reg.* v. *Vestry of St. Luke's, Chelsea*, 1871, L.R. 6 Q.B. 572; L.R. 7 Q.B. 148; *Lord Blantyre* v. *Waterwork Commrs. of Dumbarton*, 1888, 15 R. (H.L.) 56; *Glasgow District Subway Co.* v. *Robertson's Trs.*, 1895, 22 R. 790.

[5] *Bridge of Allan Water Co.* v. *Alexander*, 1868, 6 M. 321, per Lord Pres. Inglis.

SECTION 2.—PURCHASE BY AGREEMENT.

SUBSECTION (1).—*General.*

615. The statute authorises the promoters of the undertaking to contract with the owners of lands authorised to be taken by the special Act and required for the purposes of the undertaking, and with all persons having any right and interest in such lands, for the purchase of such lands and of all rights and interests therein.[2] The power conferred is confined to lands authorised to be taken by the special Act, *i.e.* defined in the plans and book of reference and within the limits of deviation.[3] Power, however, may be given by the special Act to purchase additional lands for extraordinary purposes.[4] The purchase price may take the form of a feu-duty or ground annual,[5] secured on the tolls or rates of the undertaking and enforceable by poinding and sale.[6] But in the case of railway companies poinding is now restricted in certain cases.[7]

SUBSECTION (2).—*Persons under Disability.*

616. These include all corporations, heirs of entail, liferenters, persons holding any other partial or qualified estate or interest, married women seised in their own right or entitled to terce or dower or any other right or interest, husbands, tutors, curators, guardians for infants, minors, lunatics or idiots, fatuous or furious persons, or for persons under any disability or incapacity, trustees or feoffees in trust for charitable or other purposes, executors and administrators. These persons are entitled by the statute to sell or agree to sell to promoters and to bind themselves and their successors or the wards for whom they act to the same extent as persons who are under no disability.[1] They may also exercise all powers conferred by the Act to discharge or apportion incumbrances, etc.[2] They cannot, however, at their own hand agree with the promoters as to the amount of purchase-money to be paid for lands taken, or of compensation for permanent damage or injury to their lands.[3] Such matters must be determined by one of the methods appointed for determining the compensation in a case of compulsory purchase or by the valuation of two able practical valuators, appointed by the respective parties, and in the event of these valuators disagreeing by a third valuator appointed by the Sheriff.[4] This procedure is imperative, and in the case of the sale of a portion of an entailed estate failure to observe the procedure laid down has been held to avoid the transaction in a question with a succeeding heir of entail.[5] Prior to 1853 heirs of entail, and prior to 1860 other persons under disability, could not sell lands for an annual feu-duty or ground annual.[6] But now [7] persons under disability are in the same position in this respect as persons under no disability, subject, in the case of persons under disability, to the observance of statutory procedure in the fixing of the amount of the feu-duty or ground annual.[8]

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[1] *Bridge of Allan Water Co.* v. *Alexander, supra.*

[2] Sec. 6. Agreement may oust the statutory machinery of assessment and compel parties to resort to a Court of law (*Hutchison* v. *Edinburgh and Glasgow Rly. Co.*, 1848, 10 D. 760).

[3] See Cripps, 6th ed., pp. 18 *et seq.*; *North British Rly. Co.* v. *Tod*, 1846, 5 Bell, App. 184; *Maule* v. *Moncrieffe*, 1846, 5 Bell, App. 333; *Edinburgh Tramways Co.* v. *Black*, 1873, 11 M. (H.L.) 57. For correction of mistakes in plans, etc., see 8 & 9 Vict. c. 33, s. 7 (railways); 10 & 11 Vict. c. 14, s. 7 (markets); 10 & 11 Vict. c. 17, s. 7 (waterworks); 10 & 11 Vict. c. 27, s. 7 (harbours); 10 & 11 Vict. c. 65, s. 7 (cemeteries); and *M'Callum* v. *Glasgow District Subway Co.*, 1895, 3 S.L.T. 194.

[4] See ss. 12 and 13.

[5] Sec. 10.

[6] Sec. 11.

[7] 30 & 31 Vict. c. 126, s. 4; 38 & 39 Vict. c. 31.

SUBSECTION (3).—*Lands for Extraordinary Purposes.*

617. Promoters are authorised, where empowered by the special Act, to purchase lands for extraordinary purposes, to purchase such lands from all persons enabled by the Act to sell and transact, and to sell those lands again and purchase others, subject to the restriction prescribed by the special Act as to the quantity to be held, and to the further restriction that in the case of a party under legal disability there can be only one sale of the prescribed quantity.[9] Promoters cannot acquire compulsorily lands required for extraordinary purposes, and the provisions generally of the Lands Clauses Acts are not applicable to lands acquired for such purposes.[10] Railway companies have a general power under s. 38 of the Railways Clauses Consolidation (Scotland) Act, 1845,[1] to acquire lands by agreement for extraordinary purposes, that is to say, for the purpose of making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing and loading or unloading goods or cattle to be conveyed upon the railway, and for the erection of weighing machines, toll-houses, offices, warehouses, and other buildings and conveniences; and for the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway.[2]

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[1] Sec. 7.

[2] Sec. 8.

[3] *Mackenzie* v. *Inverness, etc. Rly. Co.*, 1866, 4 M. 810.

[4] Sec. 9. Sec. 9 includes claims for damage to lands not taken. *Stone* v. *Corpn. of Yeovil*, 1876, 2 C.P.D. 99.

[5] *Mackenzie* v. *Inverness, etc. Rly. Co.*, *supra*; *Scottish Midland Junction Rly. Co.* v. *Gray*, 1850, 13 D. 410.

[6] *Scottish Midland Junction Rly. Co.* v. *Gray*, *supra*; *Falconer* v. *Aberdeen Rly. Co.*, 1853, 15 D. 352; *Fife and Kinross Rly. Co.* v. *Deas*, 1859, 21 D. 1205.

[7] 16 & 17 Vict. c. 94, s. 14; 23 & 24 Vict. c. 106, s. 3.

[8] 16 & 17 Vict. c. 94, s. 15; 23 & 24 Vict. c. 106, s. 4.

[9] Secs. 12–14.

[10] *City of Glasgow Union Rly. Co.* v. *Caledonian Rly. Co.*, 1871, 9 M. (H.L.) 115.

SUBSECTION (4).—*Rights arising on Abandonment of Undertaking.*[3]

618. It is a question of construction whether an agreement with promoters that they shall acquire certain lands at a certain price is conditional upon the carrying out of the undertaking, or is absolute, rendering the promoters liable in damages in the event of their abandoning the undertaking without acquiring the land agreed upon.[4] Powers conferred upon a railway company or similar undertaker are enabling and not obligatory, and cannot be enforced at the instance of a person interested to obtain the benefit of his contract with the company.[5]

SECTION 3.—PURCHASE OTHERWISE THAN BY AGREEMENT.

SUBSECTION (1).—*Subscription of Capital.*

619. Before the compulsory powers of taking land can be exercised, the whole of the capital prescribed for the undertaking must be subscribed.[6] A certificate under the hand of the sheriff is the statutory and conclusive evidence that this condition has been complied with.[7] It would seem, however, that this condition does not apply to an extension for which the funds are to be furnished by an existing company.[8] It is not applicable to the acquisition of a servitude or easement.[9]

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[1] 8 & 9 Vict. c. 33.

[2] See also as regards markets, 10 & 11 Vict. c. 14, s. 9; and as regards harbours, 10 & 11 Vict. c. 27, s. 20.

[3] See also below, para. 701, under Superfluous Lands.

[4] *Scottish North-Eastern Rly. Co.* v. *Stewart*, 1859, 3 Macq. 382; *Edinburgh, Perth and Dundee Rly. Co.* v. *Philip*, 1857, 2 Macq. 514; see also *North British Rly. Co.* v. *Benhar Coal Co.* 1886, 14 R. 141. In the case of railways see also 13 & 14 Vict. c. 83; 30 & 31 Vict. c. 126; 32 & 33 Vict. c. 114.

[5] *Scottish North-Eastern Rly. Co.* v. *Stewart, supra; Edinburgh Rly. Co.* v. *Philip, supra; Lord Blantyre* v. *Caledonian and Dumbartonshire, etc. Rly. Co.*, 1853, 16 D. 90; *Ross* v. *Clyde Navigation Trs.*, 1869, 7 M. 462.

[6] Sec. 15.

[7] Sec. 16; *Ystalyfera Iron Co.* v. *Neath, etc. Rly. Co.*, 1873, L.R. 17 Eq. 142.

[8] *Reg.* v. *Great Western Rly. Co.*, 1852, 1 El. & Bl., 253; *Weld* v. *London and South-Western Rly. Co.*, 1862, 32 Beav. 340.

[9] *Great Western Rly. Co.* v. *Swindon, etc. Rly. Co.*, 1884, 9 App. Cas. 787.

SUBSECTION (2).—*Other Limitations on Exercise of Compulsory Powers.*

620. Compulsory powers are strictly construed,[1] but more strictly in the case of a trading company than of a public corporation.[2] They must be exercised *bona fide* for fulfilment of the statutory objects and not from an ulterior motive, as, for instance, to appropriate the benefit of a prospective increase in land value.[3] Express authority is required to entitle a railway company to take land already vested in another railway company.[4] A contract not to exercise compulsory powers is void,[5] but they must be exercised solely for the proper purposes of the undertaking authorised by the special Act.[6] They must be put in force within the prescribed time and, where no time is specified by the special Act, within three years of its passage;[7] but it appears to be sufficient that notice is given within the limited period, provided there be no unreasonable delay in following up the inchoate transaction.[8] The limit of time only applies to powers which the promoters could not exercise except by virtue of the Act.[9] In the case of a railway company compulsory powers may be exercised outwith the time limit upon a certificate of the Minister of Transport, where additional lands are required for purposes of public safety.[10]

SECTION 4.—NOTICE TO TREAT.

SUBSECTION (1).—*Nature and Effect of Notice.*

621. When the promoters require to purchase any lands which they are authorised to purchase or take[11] they must give a notice—generally known as a notice to treat—to all the parties interested in, or enabled to dispose of, the lands, whom they can discover after diligent inquiry. This notice must demand particulars of the interests possessed,[12] and of the claims made in respect thereof, and state the particulars of the lands required, and that the promoters are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for damage sustained by the execution of the works.[1] The service of the notice puts the company in the same position as if a binding and completed contract for the purchase of the lands had been concluded.[2] "The special Act is substantially an offer of the land by the landowners to the company, and notice by the company of their intention to take the land is an acceptance of the offer." [3] The company cannot resile after giving the notice,[4] either in whole or in part.[5] On the other hand, the owner cannot create in any other party a new interest for which compensation can be claimed.[6] But he can assign his interest after notice to treat is given. The assignee then stands to all effects in the shoes of his cedent and cannot be ignored by the promoters.[7]

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[1] *Moncrieffe* v. *Perth Harbour Commrs.*, 1843, 5 D. 879.

[2] *Galloway* v. *London Corpn.*, 1866, L.R. 1 H.L. 34; *Quinton* v. *Corpn. of Bristol*, 1874, L.R. 17 Eq. 524.

[3] *Municipal Corpn. of Sydney* v. *Campbell*, [1925] A.C. 338; *Michael* v. *Corpn. of Edinburgh*, 1895, 3 S.L.T. 109. Cf. *Boswell* v. *Glasgow and South-Western Rly. Co.*, 1851, 13 D. 1157.

[4] *Dublin, etc. Rly. Co.* v. *Navan, etc. Rly. Co.*, 1871, 5 Ir. Eq. R. 393; *Caledonian Rly. Co.* v. *Glasgow and South-Western Rly. Co.*, 1903, 11 S.L.T. 510.

[5] *Ayr Harbour Trs.* v. *Oswald*, 1883, 10 R. (H.L.) 85; cf. *Caledonian Rly. Co.* v. *Turcan*, 1898, 25 R. (H.L.) 7, at pp. 17, 18; *In re Gonty, etc. Rly. Co.* [1896] 2 Q.B. 439.

[6] *Buchanan* v. *Caledonian Rly. Co.*, 1850, 12 D. 778; *Breadalbane* v. *West Highland Rly. Co.*, 1895, 22 R. 307; *Carington* v. *Wycombe Rly. Co.*, 1868, L.R. 3 Ch. 377; *Lamb* v. *North London Rly. Co.*, 1869, L.R. 4 Ch. 522.

[7] Sec. 116.

[8] *Reg.* v. *Birmingham Rly. Co.* 1850, 20 L.J. Q.B. 304; *Edinburgh and Glasgow Rly. Co.* v. *Monklands Rly. Co.*, 1850, 12 D. 1304; *Tiverton, etc. Rly. Co.* v. *Loosemore*, 1884, L.R. 9 App. Cas. 480; *Goldsmiths Co.* v. *West Metropolitan Rly. Co.*, [1904] 1 K.B. 1.

[9] *Great Western Rly. Co.* v. *Midland Rly. Co.*, [1908] 2 Ch. 644.

[10] 5 & 6 Vict. c. 55, s. 15; 26 & 27 Vict. c. 92, s. 8; 9 & 10 Geo. V. c. 50, s. 2.

[11] For meaning of "take," see *Spencer* v. *Metropolitan Board of Works*, 1882, 22 C.D. 142.

[12] See *Cameron* v. *Charing Cross Rly. Co.*, 1864, 16 C.B. N.S. 430, as to sufficiency of particulars returned.

622. It has at different times been thought that promoters must exercise their powers by taking the whole of the lands scheduled in the special Act,[8] or that having given one notice to treat for part of the lands of a proprietor they have thereby exhausted their powers and cannot give a further notice for another part of the same lands.[9] It is settled, however, that so long as promoters give notice within the specified time, they may exercise their compulsory powers in such manner as they please, may issue separate notices for different plots of land to the same proprietor at different times, and so long as they do not seek to resile from a notice given, may supersede one notice by another.[10] If promoters enter into possession and thereafter discover that there exist certain interests, in respect of which they should have issued notices to treat, but have by mistake omitted to do so, they may have the mistake remedied even after the time limit for the exercise of their compulsory powers has expired.[11] But where the promoters never intended to acquire any such interest they cannot afterwards claim to acquire it on the ground of mistake or inadvertence.[1] A notice bad as to part of the lands taken is bad as to all.[2]

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[1] Sec. 17.

[2] *Connell* v. *River Clyde Trs.*, 1845, 7 D. 829; *Glasgow, Airdrie, and Monklands, etc. Rly. Co.* v. *Glasgow Waterworks Co.*, 1849, 11 D. 1153; *Campbell* v. *Edinburgh and Glasgow Rly. Co.*, 1855, 17 D. 613, at p. 619; *Heron* v. *Espie*, 1856, 18 D. 917, at p. 922; *Mackenzie* v. *Inverness and Aberdeen Rly. Co.*, 1866, 4 M. 810, at p. 817; *Caledonian Rly. Co.* v. *City of Glasgow Union Rly. Co.*, 1869, 7 M. 959; *Lockerby* v. *City of Glasgow Improvement Trs.*, 1872, 10 M. 971; *North British Rly. Co.* v. *Lindsay*, 1875, 3 R. 168; *Corpn. of Edinburgh* v. *Lorimer*, 1914, 2 S.L.T. 225.

[3] *Forth and Clyde Junction Rly. Co.* v. *Ewing*, 1864, 2 M. 693, per Lord Justice-Clerk Inglis; see also *Connell* v. *River Clyde Trs.*, 1845, 7 D. 829, per Lord Fullerton at 839.

[4] *North British Rly. Co.* v. *Lindsay*, 1875, 3 R. 168, at p. 179; *R.* v. *Hungerford Market Co.*, 1832, 4 B. & Ad. 327; *Morgan* v. *Metropolitan Rly. Co.*, 1868, L.R. 4 C.P. 97, per Kelly C.B.

[5] *Laing* v. *Caledonian Rly. Co.*, 1846, 9 D. 70.

[6] *City of Glasgow Union Rly. Co.* v. *M'Ewen & Co.*, 1870, 8 M. 747; *North British Rly. Co.* v. *Lindsay*, *cit. supra*; *Mercer* v. *Liverpool, etc. Rly. Co.*, [1904] A.C. 461.

[7] *Caledonian Rly. Co.* v. *Barr's Trs.*, 1871, 9 S.L.R. 49; *Cardiff Corpn.* v. *Cook*, [1923] 2 Ch. 115; cf. *Caledonian Rly. Co.* v. *Watt*, 1875, 2 R. 917; *Kelvinside Estate Co.* v. *Donaldson's Trs.*, 1879, 6 R. 995.

[8] *Connell* v. *River Clyde Trs.*, *supra*.

[9] *Turnbull* v. *Scottish Central Rly. Co.*, 1848, 10 D. 373; *Douglas* v. *Caledonian Rly. Co.*, 1848, 11 D. 225; *Moncrieffe* v. *Perth Harbour Comrs.*, 1843, 5 Bell, App. 333.

[10] *Stevenson* v. *North British Rly. Co.*, 1901, 4 F. 224; *Coats* v. *Caledonian Rly. Co.*, 1904, 6 F. 1042.

[11] See *infra*, para. 699.

Subsection (2).—*Part of a House under Section* 90.

623. The promoters cannot insist on any party selling or conveying a part only of a house or other building or manufactory if he be willing to sell or convey the whole thereof.[3] But if the owner refuses to sell a part and calls on the company to take the whole, they are entitled to abandon their notice and take none,[4] and he cannot ask them to take more than they propose unless he offer the whole.[5] The promoters need not, if willing to take the whole, serve a second notice.[6] The term "house" includes everything *a cœlo usque ad centrum*, and land cannot be acquired for a tunnel under a house without liability to take the house on the surface.[7] It is a question of circumstances whether a piece of ground adjacent to or in the vicinity of a house forms part of the house. With reference to a six-acre field the test stated was whether the field was "necessary for the convenient occupation of the house," and the field was excluded as being necessary only for the personal use and enjoyment of the particular proprietor.[8] But a garden, or a stable, or a lodge, or a coal-cellar, or a piece of vacant ground used as an access or curtilage are all parts of a house, and a mill-lead is part of the mill, and the whole must be taken.[9] On the other hand, one house of a block or a semi-detached villa is not "part" of a house.[10] A canal and dock is not a building in the sense of the statute, and accordingly promoters cannot be compelled to purchase the whole of a canal undertaking where they give notice to treat for part of the property of the undertaking.[11]

Subsection (3).—*Requisites of Notice and Service.*

624. The notice may be in writing or print, or partly in both, and must be subscribed by an authorised officer of the company. It must be in strict conformity with the company's statutory powers, and if it includes any land not included under the compulsory powers, it may be held a nullity.[1] On the other hand, it limits the amount the company are entitled to take in the proceedings it initiates, and any attempt to obtain more land than it includes, without a fresh notice, may be stopped by interdict.[2] The notice must be served personally, or left at the person's last place of abode, and if any person is absent from the United Kingdom or cannot be found after diligent inquiry, it must be served upon his factor or agent, and also left with the occupier, or, if there is no occupier, fixed on a conspicuous part of the lands.[3] In special circumstances the place of a formal notice may be held to be supplied by equivalent proceedings.[4] But the statutory directions as to service should in general be strictly observed, as failure to do so may invalidate the whole proceedings.[5]

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[1] *Davidson's Trs.* v. *Caledonian Rly. Co.*, 1894, 21 R. 1060; *Stretton* v. *Great Western, etc. Rly. Co.*, 1870, L.R. 5 Ch. 751; *Martin* v. *London, etc. Rly. Co.*, 1866, L.R. 1 Ch. at p. 509.

[2] *Coats* v. *Caledonian Rly. Co.*, 1904, 6 F. 1042; *M'Callum* v. *Glasgow District Subway Co.*, 1895, 3 S.L.T. 194.

[3] Sec. 90; *Gardner* v. *Charing Cross Rly. Co.*, 1861, 2 John. & H. 248, at 256; see also *Lavers* v. *London County Council*, 1905, 93 L.T. 233.

[4] *R.* v. *London and South-Western Rly.*, 1848, 17 L.J. Q.B. 326; *Grierson* v. *Cheshire Lines Com.*, 1874, 19 Eq. 83.

[5] *Pulling* v. *London, Chatham, and Dover Rly.*, 1864, 33 L.J. Ch. 505.

[6] *Schwinge* v. *London and Blackwall Rly. Co.*, 1855, 24 L.J. Ch. 405.

[7] *Glasgow City and District Rly. Co.* v. *MacBrayne*, 1883, 10 R. 894.

[8] *Steele* v. *Midland Rly. Co.*, 1866, L.R. 1 Ch. 275; see also *Glasgow, etc. Rly. Co.* v. *Moore*, 1894, 1 S.L.T. 498.

[9] *Caledonian Rly. Co.* v. *Turcan*, 1898, 25 R. (H.L.) 7; *Caledonian Rly. Co.* v. *Jackson*, 1895, 2 S.L.T. 584; 3 S.L.T. 75; *Marson* v. *London, Chatham, and Dover Rly. Co.*, 1868, L.R. 6 Eq. 101; *Furniss* v. *Midland Rly. Co.*, 1868, L.R. 6 Eq. 473; and cases there cited.

[10] *Bryson* v. *Caledonian Rly. Co.*, 1894, 2 S.L.T. 90; *Harvie* v. *South Devon Rly. Co.*, 1874, 32 L.T. 1.

[11] *Regent's Canal and Dock Co.* v. *London County Council*, [1912] 1 Ch. 583.

SUBSECTION (4).—*Persons entitled to receive Notice.*

625. All parties interested in or entitled or enabled to sell the lands to be acquired must receive notices.[6] If parties are agreed as to a sale, notice is not necessary even in the case of persons under disability.[7] A superior, it has been said, never receives a notice to treat.[8] Nor is a person whose "lands" are not being taken, and whose sole claim to compensation is injurious affection to his property by the execution of the works, entitled to notice.[9] So a statutory power "to appropriate and use the subsoil" of certain streets for tunnelling is not equivalent to a power to purchase and does not entitle the proprietors of the *solum* to notice to treat.[10] Persons interested in lands, as distinguished from persons entitled or enabled to sell the lands, must receive notice. Such are tenants, liferenters, tercers and others indicated in ss. 6 and 7 of the statute, and persons holding some security or burden or claim thereon.[11] But the existence of a servitude over the lands to be taken does not require notice to the owner of the dominant tenement, his claim being that of a person injuriously affected.[12]

SUBSECTION (5).—*Abandonment of Notice.*

626. Promoters, as has been noted, cannot resile from a valid notice once given, except in the instance noticed below. But in a question with an unwilling proprietor they may be held to have abandoned their notice. Delay or other circumstances may be held equivalent to an abandonment of the notice by the company.[1] The promoters may abandon a notice to take part of a house or manufactory on being served with a counter-notice to take the whole.[2] Abandonment on receipt of counter-notice does not prevent the company serving a second or subsequent notice during the period specified for exercise of compulsory powers.[3] The abandonment of works authorised by one Act and the authorisation of new or additional works by a second Act do not involve the abandonment of rights acquired under the first Act.[4] Acquiescence in the transaction being abandoned will not readily be inferred against a proprietor through mere delay in enforcing his claim.[5]

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[1] *Coats* v. *Caledonian Rly. Co.*, 1904, 6 F. 1042; *M'Callum* v. *Glasgow-District Subway Co.*, 1895, 3 S.L.T. 194.

[2] *Renton* v. *North British Rly. Co.*, 1845, 8 D. 247.

[3] Sec. 18.

[4] *Glasgow, Airdrie, etc. Rly. Co.* v. *Glasgow Waterworks Co.*, 1849, 11 D. 1153.

[5] *Shepherd* v. *Corporation of Norwich*, 1885, 30 Ch. D. 553.

[6] Secs. 3 ("Owner"), 17, 18.

[7] *Supra*, para. 616; *Mackenzie* v. *Inverness, etc. Rly. Co.*, 1866, 4 M. 810, at p. 817.

[8] *Heriot's Trust* v. *Caledonian Rly. Co.*, 1915 S.C. (H.L.) 52, per Lord Dunedin at p. 59; cf. *Caledonian Rly. Co.* v. *Watt*, 1875, 2 R. 917.

[9] *Don* v. *North British Rly. Co.*, 1878, 5 R. 972.

[10] *Glasgow Coal Exchange Co.* v. *Glasgow and District Railway Co.*, 1883, 10 R. 1283.

[11] *Falconer* v. *Aberdeen Rly. Co.*, 1853, 15 D. 352, at p. 359 (tenant); *Martin* v. *London, Chatham and Dover Rly. Co.*, 1866, L.R. 1 Ch. 501 (bondholder); s. 62.

[12] *Clark* v. *School Board for London*, 1874, L.R. 9 Ch. 120.

SECTION 5.—HOW PRICE ASCERTAINED AND COMPENSATION ASSESSED.

SUBSECTION (1).—*General.*

627. If for twenty-one days after service of the notice a person interested fails to state the particulars of his claim, or to treat with the promoters, or if he and the promoters cannot agree, the compensation falls to be settled by the methods provided by the Act for settling cases of disputed compensation.[6]

These are—

(i) Determination by the sheriff, if the claim does not exceed £50, and the parties do not agree to refer the claim to arbitration.[7]

(ii) Arbitration in the option of the claimant, if the claim exceeds £50,[8] and in all cases by agreement of parties.[9]

(iii) Jury trial, if the claimant does not elect for arbitration, if he fails to state his claim, or if the arbitration lapses through delay, the claim exceeding £50.[10]

To these may be added the form of procedure where there is neither dispute nor agreement, owing to the absence of the party interested, or where the party claiming fails to appear before the jury,

(iv) Valuation by a valuator appointed by the sheriff, subject to submission to arbitration as to whether the sum fixed is sufficient, if the party entitled is dissatisfied.[11]

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[1] *Hedges* v. *Metropolitan Rly. Co.*, 1860, 28 Beav. 109; *Stretton* v. *Great Western, etc. Rly. Co.*, 1870, L.R. 5 Ch. 751; *Richmond* v. *North London Railway Co.*, 1868, L.R. 5 Eq. 352; L.R. 3 Ch. 679.

[2] *Grierson* v. *Cheshire Lines Committee*, 1874, L.R. 19 Eq. 83.

[3] *Ashton Vale Iron Co.* v. *Mayor of Bristol*, [1901] 1 Ch. 591.

[4] *Dundas's Tr.* v. *Forth Bridge Rly. Co.*, 1884, 12 R. 209.

[5] *Corporation of Edinburgh* v. *Lorimer*, 1914, 2 S.L.T. 225.

[6] Sec. 19.

[7] Sec. 21.

[8] Sec. 23.

[9] Sec. 20.

[10] Secs. 23, 35, 36.

[11] Secs. 46, 56, 57.

SUBSECTION (2).—*Sheriff's Award.*

628. The sheriff on the application of either party summons the other party to appear before him, conducts an inquiry without written pleadings or notes of evidence, pronounces a determination, and settles the question of expenses.[1] Unless it can be shown that he has exceeded his jurisdiction, as *e.g.* by giving compensation for something specially excluded as an element for consideration,[2] the sheriff's determination is final and conclusive and not subject to review.[1] The claim of a tenant from year to year, or of a tenant who does not produce his lease within twenty-one days of a demand made by the promoters in writing, falls to be dealt with by the sheriff irrespective of the amount of the claim.[3]

SUBSECTION (3).—*Arbitration.*

629. A person desiring to have the amount of his compensation settled by arbitration, must signify his desire to the promoters in writing, before they have presented a petition to the sheriff to summon a jury, stating the nature of his interest and the amount of compensation claimed.[4] Within twenty-one days of the receipt of such notice the compensation falls to be settled by arbitration, unless the promoters agree in writing to pay the amount claimed.[4] Unless both parties concur in appointing a single arbiter, each nominates his own. Delivery of the nominations to the arbiters operates as a submission to arbitration, and neither party is entitled to revoke the same without the consent of the other,[5] nor does death of the party operate as a revocation. If for fourteen days after the dispute has arisen and after a request in writing served by the other a party fail to appoint an arbiter, the other party, having himself made an express appointment of an arbiter, may appoint such arbiter to act for both parties, and his award will be binding and final.[6] If an arbiter die, the person who appointed him may appoint another to act in his place; and if for seven days after notice in writing from the other party, he fail to do so, the remaining arbiter may proceed *ex parte.*[7] Similarly, if either arbiter refuse or for seven days neglect to act,[8] the other may proceed *ex parte*,[9] and it is not a condition precedent to such *ex parte* proceedings that an oversman should have been appointed.[10] If, however, a single arbiter dies, the matter must be begun *de novo.*[11]

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[1] Sec. 22.

[2] *Glasgow District Subway Co.* v. *Esslemont*, 1895, 22 R. 658.

[3] Secs. 114, 115; *Glasgow District Subway Co.* v. *Albin & Son*, 1895, 23 R. 81; *Caledonian Rly. Co.* v. *Barr*, 1855, 17 D. 312.

[4] Sec. 23.

[5] *Yates* v. *Blackburn Corpn.*, 1860, 29 L.J. Ex. 447.

[6] Sec. 24; *Bradley* v. *London and North-Western Rly. Co.*, 1850, 20 L.J. Ex. 3.

[7] Sec. 25.

[8] *Willoughby* v. *Willoughby*, 1847, 9 Q.B. 923.

[9] Sec. 29.

[10] *Shepherd* v. *Corporation of Norwich*, 1885, 30 Ch. D. 553.

[11] Sec. 28.

630. When two arbiters have been appointed, they and not the parties [1] must, before entering on the matters referred to them, nominate an oversman by writing, and on the death or incapacity of the oversman, another in his place.[2] If "in either of the cases aforesaid" they refuse, or for seven days after request of either party neglect, to appoint, the Lord Ordinary may, on the application of either party, make an appointment of oversman.[3] In one case where the arbiters, having originally failed to agree, refused to appoint an oversman, one was appointed by the Lord Ordinary; [4] but in another case, where the arbiters had neglected for more than seven days to appoint, the Lord Ordinary declined to appoint, on the ground that there had been no previous nomination which had failed.[5] The appointment by the Lord Ordinary of an oversman is a ministerial act and cannot be reclaimed against, and in the absence of a nullity cannot be recalled by the Lord Ordinary.[6] An arbiter is disqualified by being a stockholder of the promoter's undertaking, and all proceedings following on such an appointment may be rendered null.[7] The person making such an appointment is not, however, liable in damages to the other party.[7]

631. If the arbiters fail to make their award within twenty-one days, or within the time prorogated by them, the submission devolves on the oversman.[8] They may call for documents and take evidence.[9] The arbiters or oversman must make their award within three months, and if they fail to do so the compensation falls to be settled by a jury.[10] As regards the oversman, the period of three months dates from the time when he is called upon to exercise his functions.[11] The arbiters may appoint the oversman at any time within their three months, even though their own capacity to make an award has failed by the lapse of the twenty-one days.[12] The statutory period of three months may be prorogated by consent of parties; [13] but it is doubtful whether this power to prorogate extends to an heir of entail or other person under disability.[14]

632. The expenses of the arbiters and oversman, including their reasonable remuneration,[15] and of recording and extracting the decreet-arbitral, fall in all cases to be borne by the promoters of the undertaking; the expenses of or incident to the arbitration are similarly treated, except in the case where there is awarded the same sum as, or a less sum than, was offered by the promoters, in which case each party defrays his own expenses.[1] Interest on the principal sum contained in the award may be sufficient to bring the total sum awarded above the amount of a tender, so as to entitle the claimant to the expenses of the arbitration.[2] The offer which is to be founded on as affecting the question of expenses must be made before the reference becomes irrevocable by delivery of the nominations.[3] The promoters are liable in expenses, where they have made no tender, if compensation, however small, is awarded,[4] and the offer must be in respect of the same subject-matter as that in respect of which the award is made.[5] It must be a clear offer not coupled with any condition as to works.[6] If no compensation is found due, the section does not apply.[7] It applies only to arbitrations entered into under the provisions of the statute, and not to questions of compensation referred by voluntary agreement.[8] But an offer made in prospect of jury trial, and not withdrawn, is good although the compensation has been settled by arbitration.[9] The finding as to expenses need not be contained in the award itself,[10] and expenses may be awarded after the expiration of the three months within which the award itself must be pronounced.[11] The promoters cannot withhold payment of the expenses on the plea that the claimants' title to the lands is defective.[12]

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[1] *Glasgow, etc. Rly. Co.* v. *Nitshill Coal Co.*, 1850, 7 Bell's App. 325. [2] Sec. 26.

[3] Sec. 27. [4] *Mackenzie* v. *Inverness and Ross-shire Rly. Co.*, 1861, 24 D. 251.

[5] *Union Bank, Petr.*, 1897, referred to in Deas, Law of Railways, 958.

[6] *Mackenzie* v. *Inverness and Ross-shire Rly. Co.*, 1861, 24 D. 251.

[7] *Sellar* v. *Highland Rly. Co.*, 1919 S.C. (H.L.) 19. [8] Sec. 30. [9] Sec. 31.

[10] Sec. 35; see *Laing* v. *Caledonian Rly. Co.*, 1850, 12 D. 481; *Falconer* v. *Aberdeen Rly. Co.*, 1853, 15 D. 352; *Anderson* v. *Deeside Rly. Co.*, 1853, 15 D. 713.

[11] *Skerratt* v. *North Staffordshire Rly. Co.*, 1848, 5 Rail. C. 166; *In re Pullen*, 1882, 51 L.J. Q.B. 285.

[12] *East and West India Docks, etc. Co. and Bradshaw, Re*, 1848, 5 Rail. C. 527.

[13] *Caledonian Rly. Co.* v. *Lockhart*, 1849, 12 D. 338; 1860, 3 Macq. 808; *Gillespie* v. *Paisley Road Trust*, 1900, 7 S.L.T. 350; *Clark* v. *City of Glasgow Union Rly. Co.*, 1868, 6 S.L.R. 185.

[14] *Mackenzie* v. *Inverness and Aberdeen Junction Rly. Co.*, 1866, 4 M. 810.

[15] *Murray* v. *North British Rly. Co.*, 1900, 2 F. 460.

633. It would appear that arbitration by agreement does not necessarily amount to a statutory submission, though the parties may introduce certain of the statutory incidents into their common law submission.[13] But an arbitration between a person under disability and the promoters, even by agreement, must be regarded as a full statutory submission.[14]

SUBSECTION (4).—*Jury Trial.*

634. If the claimant does not demand a reference, or if the reference is not concluded within the prescribed time, the compensation falls to be settled by a jury.[15] Any person entitled to compensation exceeding

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[1] Sec. 32. Taxation in case of railways by Auditor of Court of Session, 30 & 31 Vict. c. 126, s. 37.

[2] *Riddell* v. *Lanarkshire and Ayrshire Rly. Co.*, 1904, 6 F. 432; cf. *Carmichael* v. *Caledonian Rly. Co.*, 1870, 8 M. (H.L.) 119.

[3] *Yates* v. *Blackburn Corpn.*, 1860, 29 L.J. Ex. 447; *Gray* v. *North-Eastern Rly. Co.*, 1876, 1 Q.B.D. 696; *Fitzhardinge* v. *Gloucester Canal Co.*, 1872, L.R. 7 Q.B. 776.

[4] *Martin* v. *Leicester Waterworks Co.*, 1858, 27 L.J. Ex. 432.

[5] *Miles* v. *Great Western Rly. Co.*, [1896] 2 Q.B. 432.

[6] *Fisher* v. *Great Western Rly. Co.*, [1911] 1 K.B. 551.

[7] *R.* v. *Byron*, 1852, 16 Jur. 640.

[8] Cf. *Ex parte Reynal*, 1847, 5 Rail. C. 60.

[9] *Lascelles* v. *Swansea School Board*, 1899, 69 L.J. Q.B. 24.

[10] *Gould* v. *Staffordshire Potteries Waterworks Co.*, 1850, 6 Rail. C. 568, 573.

[11] *Martin* and *Gould*, *cit. supra.*

[12] *Dundas* v. *West Highland Rly. Co.*, 1902, 10 S.L.T. 147.

[13] *Caledonian Rly. Co.* v. *Lockhart*, 1860, 3 Macq. 808.

[14] *Mackenzie* v. *Inverness, etc. Rly. Co.*, 1866, 4 M. 810.

[15] Sec. 35.

£50 may give written notice to the promoters stating his desire to have the compensation fixed by a jury, the nature of his interest and the amount claimed and, unless the promoters agree to pay the amount claimed, they must, within twenty-one days of the notice being received, present a petition to the sheriff to summon a jury, and in default are liable for the whole sum claimed.[1] The promoters must give not less than ten days' notice to the other party of their intention to summon a jury, and must state in such notice what sum they are prepared to give the claimant.[2] This constitutes the tender by the promoters. This notice is essential to the validity of the proceedings, and failure to give this notice within the prescribed period will subject the promoters to liability for the full sum demanded.[3] But it is a condition precedent to the promoters liability that the claimant himself gives notice of a valid claim under s. 36, and if he serves an invalid notice on the promoters the latter are entitled to disregard it.[4] The claimant's notice may be signed by his agent, and need not be holograph or tested, nor contain full particulars of the claimant's interest in the lands.[5] The procedure of s. 36 is available irrespective of whether the promoters have already entered on the lands or not, or of the fact that there has already been an abortive arbitration, and is available to a person interested in the lands as well as to the owner entitled to dispose of them.[6]

635. Ten days' notice of the time and place of the inquiry must be given in writing to the claimant or his agent,[7] but this notice may be dispensed with by him.[8] The sheriff summons a jury of twenty-five indifferent persons qualified as civil common jurymen,[9] out of whom, supplemented if necessary by bystanders, a jury of thirteen is empanelled.[10] The sheriff presides, and the jury, or seven of them, may view the lands.[11] Penalties are imposed on defaulting jurymen and witnesses,[12] and the jury must be sworn.[13] If the claimant does not appear, the inquiry cannot proceed, and the compensation falls to be determined by a valuator appointed by the sheriff.[14] The jury must return their verdict separately for the sum to be paid for the land, and for the sum to be paid as compensation for damage by severance of the lands taken from the claimant's other lands held therewith, or by otherwise injuriously affecting such lands, unless the parties agree to dispense with such separation.[15]

636. The sheriff gives judgment in accordance with the verdict, and the verdict and judgment must be recorded.[16] A verdict which failed to exhaust the subject-matter submitted to the jury has been held null and void.[1] The expenses must be borne by the promoters, unless the jury give a sum the same as, or less than, that previously offered, or unless the claimant fail to appear after due notice, in either of which cases one-half of the promoters' expenses falls to be defrayed by the claimant.[2] This provision has no application where the promoters have made no offer, and the claimant has no right at all in respect of the claim made.[3] The "sum previously offered" is that required to be specified in the statutory ten days' notice of intention to summon the jury.[4] The offer may be accepted by the claimant at any time before the verdict of the jury is given.[5] The expenses in case of difference fall to be settled by the sheriff,[6] and they may be recovered by poinding and sale, and also in the case of promoters by retention from the amount of any sum awarded by the jury.[7]

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[1] Sec. 36.

[2] Sec. 37.

[3] *Edinburgh, Perth, and Dundee Rly. Co.* v. *Leven*, 1852, 1 Macq. 284.

[4] *Falconer* v. *Aberdeen Rly. Co.*, 1853, 15 D. 352; *Fife and Kinross Rly. Co.* v. *Deas*, 1859, 21 D. 1205; *Edinburgh and Leith Glass Co.* v. *North British Rly. Co.*, 1862, 24 D. 1236.

[5] *Forth and Clyde Junction Rly. Co.* v. *Ewing*, 1864, 2 M. 684.

[6] *Falconer* v. *Aberdeen Rly. Co.*, *cit. supra.*

[7] Sec. 40.

[8] *Lang* v. *Glasgow Court House Commrs.*, 1871, 9 M. 768.

[9] Sec. 39.

[10] Sec. 41.

[11] Sec. 42.

[12] Secs. 43, 44, 45.

[13] Sec. 47.

[14] Sec. 46.

[15] Sec. 48.

[16] Sec. 49.

637. Either party may insist on a special jury, but the claimant, if he wishes such a tribunal, must give notice to the promoters before presentation of their petition to the sheriff. The sheriff nominates and reduces the special jury after statutory intimation to and in presence of the parties.[8] Any deficiency of special jurymen may be made up from persons qualified as special or common jurymen, not previously struck off, and who can readily be procured, subject to the lawful challenges, and the inquiry then proceeds as if before a common jury.[9] Any other inquiry may be taken of consent before the same jury.[10] The provisions of s. 40 as to notice of the inquiry may apply to an inquiry by special jury.[11]

SUBSECTION (5).—*Valuation in Case of Absent Parties.*

638. In the case of persons absent from the kingdom, persons who cannot, after diligent inquiry, be found, and persons who do not appear at the time appointed for jury trial, the compensation falls to be determined by a valuator appointed by the sheriff on the application of the promoters.[12] The valuator makes his valuation, annexes a declaration of its correctness, and gives it to the promoters, who preserve it, and must produce the same to the owner or other persons interested on demand.[13] All the expenses are borne by the promoters.[14] If a person whose compensation has been determined in absence is dissatisfied with the amount of the valuation, he may require the question whether the same was sufficient to be submitted to arbitration;[15] and, if a further sum is awarded, the promoters must pay or deposit the same within fourteen days, and bear all the expenses, but, on the other hand, if the arbiters hold the sum to have been sufficient, the expenses are in their discretion.[1]

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[1] *Commrs. for Leith Harbour* v. *Trinity Harbour Co.*, 1842, 4 D. 1056.

[2] Sec. 50.

[3] *Todd* v. *Metropolitan District Rly. Co.*, 1871, 24 L.T. 435.

[4] *Reg.* v. *Smith, In re Westfield and Metropolitan Rly. Cos.*, 1883, 12 Q.B.D. 481; *Pearson* v. *Great Northern Rly. Co.*, 1869, L.R. 7 Q.B. 785.

[5] *Rex* v. *High Bailiff of Westminster*, [1903] 2 K.B. 189.

[6] Sec. 51, as amended by 40 & 41 Vict. c. 50, s. 12.

[7] Sec. 52.

[8] Sec. 53.

[9] Sec. 54.

[10] Sec. 55.

[11] *Lang* v. *Glasgow Court House Commrs.*, 1871, 9 M. 768.

[12] Secs. 56, 57.

[13] Secs. 57, 59.

[14] Sec. 60.

[15] Secs. 63, 64.

SUBSECTION (6).—*Review of Assessment.*

639. Proceedings in pursuance of the Act are not subject to review.[2] On a question of amount an award by arbiter, sheriff, or jury is accordingly final.[3] And on any question of law or fact affecting the award and within the jurisdiction of the assessing tribunal, the decision of the tribunal is likewise final.[4] But if compensation is awarded upon a ground which is not authorised by the statute, the award is incompetent and may be reduced by a Court of law.[5] An arbiter may be examined in reduction proceedings as to the grounds upon which he proceeded in making his award.[6] The assessing tribunal may not adjudicate upon a person's title to claim compensation.[7] A person's title to claim compensation may be established by action of declarator.[8] A claim is not excluded by the Public Authorities Protection Act.[9] Interdict of assessment proceedings has been refused in spite of the fact that an action challenging their competency was under appeal to the House of Lords.[10]

SECTION 6.—INTERESTS TO BE COMPENSATED.

SUBSECTION (1).—*General.*

640. Sec. 61 of the Act of 1845 provides that, in estimating the purchase-money or compensation to be paid by the promoters of the undertaking, regard shall be had not only to the value of the land to be purchased or taken by the promoters, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any other Act incorporated therewith. Sec. 62 provides that on estimating the purchase-money or compensation to be paid by the promoters, the sheriff, arbiters, valuator, or jury shall apportion the said compensation among the parties who may be interested in the said lands as joint owners or lessees, or as holding some security or burden or claim thereon or interest therein, and who shall have been parties to the said trial or arbitration or valuation: provided always that nothing therein contained shall prevent any person having a separate interest from having the same separately tried. Various classes of interest fall to be considered.

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[1] Secs. 65, 66.

[2] Sec. 138.

[3] *City of Glasgow Union Rly. Co.* v. *Hunter*, 1870, 8 M. (H.L.) 156; *Caledonian Rly. Co.* v. *Carmichael*, 1870, 8 M. (H.L.) 119.

[4] *Caledonian Rly. Co.* v. *Turcan*, 1898, 25 R. (H.L.) 7; *Edinburgh and District Water Trs.* v. *Clippens Oil Co.*, 1902, 4 F. (H.L.) 40.

[5] Cases *ut supra*; and see *infra*, para. 707.

[6] *Lockerby* v. *City of Glasgow Improvement Trs.*, 1872, 10 M. 971; *Glasgow City, etc. Rly. Co.* v. *Macgeorge, Cowan & Galloway*, 1886, 13 R. 609.

[7] *Lockerby* v. *City of Glasgow Improvement Trs.*, *ubi cit.*

[8] *Smith* v. *Lanarkshire and Ayrshire Rly. Co.*, 1905, 12 S.L.T. 783.

[9] *Corpn. of Glasgow* v. *Miller*, 1905, 13 S.L.T. 167; *Gilliland* v. *County Council of Ayr*, 1907, 15 S.L.T. 21.

[10] *Campbell* v. *Edinburgh and Glasgow Rly. Co.*, 1855, 17 D. 790.

Subsection (2).—*Owners.*

641. "Owner" includes not only a proprietor in his own right, but also a person enabled by the statute to sell.[1] It would seem that the promoters are entitled to recognise the person actually in possession as proprietor as the person with whom to deal.[2] The owner is entitled to be paid for the value of the lands taken and also to be compensated in money for any permanent injury to the remainder[3] of the lands by severance or otherwise or by the construction or use of the works.[4] But the injury arising from the execution or use of the works must arise from works executed on the portion of the lands taken, unless the claim is such as would be admissible in the case of a person no part of whose lands had been taken;[5] and the injury must be injury to lands, not personal injury or inconvenience to the owner or to his trade or business.[6] So where compensation was claimed for injury to lands from the erection of a foghorn on an island, part of which was taken under statutory powers, it was held by two of the judges that the damage, if any, was of the nature of a personal nuisance rather than an injury to the lands; and also that the lands said to be injuriously affected were not part of the lands taken, being on the mainland and separated from the land taken by the sea.[7] And where facilities provided by a railway company on land taken induced an adjacent proprietor to give up a wayleave over part of the lands taken, it was held that this did not give a claim of compensation to the proprietor who lost the rent for the wayleave.[8]

Subsection (3).—*Tenants.*

642. A tenant's right to compensation is specially recognised.[9] Thus a tenant is entitled to compensation in respect of damage by severance,[10] for injurious affection by the execution of the authorised works,[1] and for loss of profit by disturbance,[2] and he may take action for the recovery of penalties under s. 87.[3] The compensation must take the form of a lump sum, not of an annual payment.[4] The fact that there existed in the proprietor the right to resume the subjects leased does not deprive the tenant of his claim for compensation,[5] nor does the existence of a break in the lease, though this is an element which the arbiter may consider.[6] But a tenant is not entitled to have the expectancy of a renewal of his lease valued.[7] Promoters who have acquired by agreement the lands of a proprietor are not bound to treat with a tenant of the lands, except as and when and to the extent to which they require to exercise their statutory powers.[8] But for any breach of the terms of the lease the tenant's claim against the promoters is under the statute, not under the lease.[9] It is doubtful whether a lease requires to be followed by possession to found a claim by the tenant.[10] A right or permission associated with lands, *e.g.* to supply refreshments for a term of years at a theatre, has been held not to be an interest in lands entitling to compensation.[11]

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[1] Sec. 3, "Owner."

[2] *Methven's Exrs.* v. *Edinburgh, Perth, and Dundee Rly. Co.*, 1851, 13 D. 1262.

[3] See *Cowper Essex* v. *Local Board for Acton*, 1889, 14 App. Cas. 153, at p. 167; *Holditch* v. *Canadian Northern Ontario Rly. Co.*, [1916] 1 A.C. 536.

[4] Secs. 9, 17, 20, 48, 56, 61; *Duke of Buccleuch* v. *Metropolitan Board of Works*, 1872, L.R. 5 H.L. 418; *Cowper Essex* v. *Local Board of Acton*, *supra*.

[5] *City of Glasgow Union Rly. Co.* v. *Hunter*, 1870, 8 M. (H.L.) 156; *Caledonian Rly. Co.* v. *Ogilvie*, 1856, 2 Macq. 229; *Horton* v. *Colwyn Bay, etc. Urban District Council*, [1908] 1 K.B. 327; see *infra*, para. 650 *et seq.*

[6] *Caledonian Rly. Co.* v. *Ogilvie*, *ubi cit.*; *Nisbet-Hamilton* v. *Commrs. of Northern Lighthouses*, 1886, 13 R. 710, and see *infra*, para. 654, note 8.

[7] *Nisbet-Hamilton* v. *Commrs. of Northern Lighthouses*, *ubi. cit.*

[8] *Aikman* v. *Caledonian Rly. Co.*, 1877, 4 R. 1020.

[9] Secs. 113, 114; *Falconer* v. *Aberdeen Rly. Co.*, 1853, 15 D. 352; *Ferguson* v. *Hood*, 1881, 9 R. 168.

[10] Sec. 113; see *Hunter* v. *North British Rly. Co.*, 1849, 12 D. 37.

643. The interest of a yearly tenant or of a tenant in the last year of his lease was in 1845 regarded as of a limited kind, and special provision is made that in such case the compensation shall be assessed by the sheriff.[12] If required to give up possession before the expiry of his term the tenant is entitled to compensation for the value of his unexpired term or interest, and for any just allowance which ought to be made to him by any incoming tenant, and for any loss or injury he may sustain or, where part of the lands leased are taken, for severance damage, or other injurious affection.[12] This section has, in Scotland, been held to apply in cases where, no part of the tenants' lands being taken, his claim was solely in respect of his being injuriously affected.[13] A purchaser by instalment payments, with no right of property until the final instalment is paid, has a higher right than a tenant for a year, and does not fall under this section.[14] If a tenant claims compensation as having an interest for a greater period than one year, the promoters may call on him to produce his lease, and if he does not do so within twenty-one days of such demand made in writing he falls to be treated as a yearly tenant.[1] The promoters are not entitled to make such demand until the tenant makes his claim for compensation.[2]

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[1] *Caledonian Rly. Co.* v. *Barr*, 1855, 17 D. 312.

[2] *Lanarkshire and Dumbartonshire Rly. Co.* v. *Main*, 1895, 22 R. 912; *Fleming* v. *District Committee of Middle Ward of Lanarkshire*, 1895, 23 R. 98.

[3] *Glasgow District Subway Co.* v. *Johnstone*, 1892, 20 R. (J.) 28.

[4] *Falconer* v. *Aberdeen Rly. Co.*, 1853, 15 D. 352.

[5] *Solway, etc. Rly. Co.* v. *Jackson*, 1874, 1 R. 831, approved in *Fleming* v. *Newport Rly. Co.*, 1883, 10 R. (H.L.) 30, at p. 36; *Gilliland* v. *County Council of Ayr*, 1907, 15 S.L.T. 21; cf. *District Committee of Middle Ward of Lanarkshire* v. *Marshall*, 1896, 24 R. 139; *Macmillan* v. *Cameron*, 1897, 5 S.L.T. 120.

[6] *Fleming* v. *District Committee of Middle Ward of Lanarkshire, supra.*

[7] *Lynch* v. *Corpn. of City of Glasgow*, 1903, 5 F. 1174.

[8] *Stevenson* v. *North British Rly. Co.*, 1901, 4 F. 224.

[9] *Manchester, etc. Rly. Co.* v. *Anderson*, [1898] 2 Ch. 394.

[10] *North British Rly. Co.* v. *Lindsay*, 1875, 3 R. 168.

[11] *Warr & Co.* v. *London County Council*, [1904] 1 K.B. 713.

[12] Sec. 114; *Ferguson* v. *Hood*, 1881, 9 R. 168.

[13] *Caledonian Rly. Co.* v. *Barr*, 1855, 17 D. 312; *Glasgow District Subway Co.* v. *Albin & Son*, 1895, 23 R. 81; *cf.* cases cited in last-mentioned case as to English practice.

[14] *Caledonian Rly. Co.* v. *Morrison*, 1898, 25 R. 1001.

644. The landlord has no lien for his rent on any compensation paid to the tenant.[3] Apportionment of rent where part only of lands under lease is taken is dealt with elsewhere.[4]

SUBSECTION (4).—*Bondholders.*

645. Provisions dealing with their interests are contained under the heading, Lands in Mortgage,[5] defined as lands subject to any security by real lien, wadset, heritable bond, redeemable bond of annuity or other right in security. If the lands are so encumbered, the promoters may redeem the security by tendering the full amount of principal, interest, and expenses, with six months' additional interest, or upon six months' notice by tendering the amount of principal, interest, and expenses, and are thereby entitled to a conveyance or discharge.[6] If the holder of the security fails to grant a conveyance or discharge or fails to adduce a good title, the promoters may deposit the sum in bank and expede a notarial instrument.[7] If the lands are of less value than the debt, the promoters may agree with the owner of the lands and with the security holder the value of the lands or compensation to be paid, or, failing agreement, may have the amount assessed as in other cases of disputed compensation, and on payment to the creditor of the agreed-on or awarded value are entitled to a conveyance of the security and of the debt so far as paid, and thereupon the interest of both owner and creditor in the lands ceases.[8] Where part only of the lands is taken, and that part is of less value than the debt, similar provision is made for the assessment of compensation and payment and for a conveyance or discharge in favour of the promoters of the security-holder's interest in the part taken. In this case the whole of the sum awarded as the value of the lands must be paid over to the security holder[9] and a memorandum of the amount paid must be endorsed on the bond by the holder and a copy thereof, if required, be furnished by the promoters at their expense to the owner of the land.[10] In both these latter cases also, if the security-holder fails to convey or adduce a good title, the sum may be deposited and a title expede by notarial instrument.[11] If the sums secured are paid off before the time stipulated in the deed creating the security the promoters must pay all expenses incident to their reinvestment,[12] and if the rate of interest secured by the deed is higher than can reasonably be expected on reinvestment, compensation must be paid for the loss so incurred.[13] Failure to give notice to and treat with security-holders, in terms of the statute, may prejudice promoters by leaving the lands subject to the burden of the secured debt.[1] A bondholder may have, like an owner, a claim for injurious affection in respect of other lands held under his security.[2]

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[1] Sec. 115.

[2] *Forfar, etc. Rly. Co.* v. *Bell*, 1892, 19 R. 786.

[3] *Peddie* v. *Brown*, 1857, 3 Macq. 65.

[4] *Infra*, paras. 697, 698.

[5] Secs. 99–106.

[6] Sec. 99.

[7] Sec. 100.

[8] Sec. 101.

[9] *Ex parte Strabane Rural District Council*, [1910] 1 I.R. 135.

[10] Sec. 103.

[11] Secs. 102, 104.

[12] Sec. 105.

[13] Sec. 106.

SUBSECTION (5).—*Superiors and Creditors in Ground Annuals or other Annual or Recurring Payments charged on Lands.*

646. The lands embraced under this head are lands charged with any feu-duty, ground annual, casualty of superiority, or any rent or other annual or recurring payment or incumbrance not hereinbefore provided for.[3] The conception of the draftsman that the superiority is a burden on the lands has been the cause of some confusion and has created difficulties in interpreting the provisions dealing with the so-called rent charges.[4] Yet in the practical application of these provisions the rights of the superior probably take first place. These provisions are contained in ss. 107 to 111 of the Act with which must be read also s. 126.

647. It is impossible to reconcile the various opinions that have been given as to the meaning of this *fasciculus* of sections. In the light of the authorities the following propositions would seem to be established:—

1. The sections apply only where a statutory title [5] has been taken.[6]

2. Where the whole lands held on one title have been taken, if neither party choses to redeem, the recurring charges remain due and may be recovered by petitory action.[7]

3. Where part of the lands is taken all liability for feu duties or casualties to the superior on the part of the promoters is extinguished.[8]

4. On the other hand, where part of the lands is taken there is no provision extinguishing recurring payments other than feu-duties or casualties, and liability for these would seem to continue until redemption.[9]

5. A superior may call upon the promoters to redeem the recurring feu-duties and casualties or to make compensation for their extinction under ss. 107 and 126,[10] and he is not barred from claiming compensation

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[1] *Martin* v. *London, Chatham and Dover Rly. Co.*, 1866, L.R. 1 Ch. 501; *Heriot's Trust* v. *Caledonian Rly. Co.*, 1915 S.C. (H.L.) 52, at p. 67.

[2] *R.* v. *Clerk of Peace for Middlesex*, [1914] 3 K.B. 259.

[3] Sec. 107, headnote.

[4] *Heriot's Trust* v. *Caledonian Rly. Co.*, 1915 S.C. (H.L.) 52; *Fraser* v. *Caledonian Rly. Co.*, 1911 S.C. 145, per Lord Pres. Dunedin.

[5] *Infra*, para. 685.

[6] *Heriot's Trust* v. *Caledonian Rly. Co., ubi cit.*; cf. *Fraser* v. *Caledonian Rly. Co., ubi cit.*, per Lords Dunedin and Kinnear.

[7] Sec. 107; *Heriot's Trust* v. *Caledonian Rly. Co., ubi cit.*; *Mags. of Elgin* v. *Highland Rly. Co.*, 1884, 11 R. 950; *Murdoch* v. *Caledonian Rly. Co.*, 1906, 14 S.L.T. 527 (ground annual).

[8] Sec. 126; *Heriot's Trust* v. *Caledonian Rly. Co., ubi cit.*; *Mags. of Elgin* v. *Highland Rly. Co., ubi cit.*; *Raeburn* v. *Geddes*, 1870, 9 M. 20; but *cf.* Lord Parmoor in *Heriot's* case and *Fraser* v. *Caledonian Rly. Co., ubi cit.*, per Lord Johnston.

[9] Secs. 107 to 111; and Lord Johnston in *Fraser's* case, *ut supra.*

[10] *Heriot's* case and *Mags. of Elgin, cit. supra.* See *Hill* v. *Caledonian Rly. Co.*, 1887, 5 R. 386, as to basis of computation of casualty of composition.

by the fact that he has allowed the promoters to take possession or has delayed in making his claim.[1] A creditor in a recurring payment has the same right to redemption as a superior.[2]

6. Promoters would seem to have an equal right with the person in right of the payment to have the same redeemed, although in their case the right rests on implication from the statutory provisions.[3]

7. If part only of the lands charged with a recurring payment is required to be taken, the payment may be apportioned by agreement between the party entitled to the charge and the owner of the lands on the one part and the promoters on the other, or, failing agreement, by the sheriff; if the lands remaining are a sufficient security for the charge, the party entitled to the charge may, with the consent of the owner, discharge the part to be taken in consideration of the other lands remaining exclusively subject to such charge.[4] This provision is essential to the settling of compensation or redemption where part only of the lands is taken.[5]

8. If a statutory title has been taken prior to 1874 by a corporation, it would seem to be an open question whether any recurring casualty can fall due under s. 5 of the Conveyancing Act, 1874, and *ergo* whether compensation can be demanded therefor.[6]

9. If a statutory title has been taken after 1874 such a casualty would seem to be due *vi statuti*.[6]

10. Compensation in respect of the loss of casualties of superiority is calculated as at the date of making up a statutory title, and in the case of redemption as at the date of demand.[7]

648. The Act contains the usual provisions for the amount of the redemption money or compensation being settled, failing agreement, as in other cases of disputed compensation,[8] and for deposit of the amount thereof and the expeding of a notarial instrument by the promoters on failure of the person entitled to execute a discharge or to adduce a good title.[9] The recording of the notarial instrument discharges the lands taken of the incumbrance [9] and leaves the person entitled with his rights undisturbed over the remainder of the lands, if any.[10] The promoters, if required, must execute a probative deed, setting forth in terms of the statute the particulars of the charge and its extinction, which shall be competent evidence in all courts and elsewhere of the facts therein stated.[10]

SUBSECTION (6).—*Persons having Rights of Commonty.*

649. Where a number of persons exercise rights in common over land, the statute makes provision for the promoters transacting with a committee of such persons authorised to bind the whole body.[1] The procedure for the acquisition of their rights closely follows the procedure observable in the ordinary case of acquisition from a proprietor. The procedure is an exercise of a compulsory power, and presumably limited to lands authorised to be compulsorily acquired, though it may be exercised to extinguish rights in lands purchased by agreement.[2] The promoters must call a meeting of all those interested, by means of prescribed notices.[3] The meeting may appoint a committee, not exceeding five in number, who, for the purpose of ascertaining the compensation, are to be deemed the proprietors, and have full power to agree as to the compensation, or fall to be dealt with or to act as proprietors where the compensation is disputed.[4] The notice of claim apparently requires to be signed by all the members of this committee.[5] If no committee is appointed, the compensation is determined by a valuator nominated by the sheriff as in the case of absent parties;[6] and upon payment or tender to the committee or any three of them, or if there is no committee, on deposit in bank, the promoters may execute a disposition, which vests the lands in them and entitles them to immediate possession, while the Court may order payment of the deposited money, on petition, for the benefit of the parties interested.[7] Where the compensation has been paid to the committee by the promoters, it is apportioned by the committee among the parties interested and the promoters have no liability therefor.[8] Although the committee may act by a majority,[9] it would appear that the whole committee must sign all statutory notices sent to the promoters, and that if one member resigns the committee must be reconstituted.[5]

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[1] *Mags. of Inverness* v. *Highland Rly. Co.*, 1909 S.C. 943.

[2] Sec. 107.

[3] Secs. 107–111; *Heriot's* case and *Mags. of Elgin*, *cit. supra*; cf. *Todd* v. *Clyde Trs.*, 1843, 6 D. 108.

[4] Sec. 109.

[5] *Mags. of Elgin* v. *Highland Rly. Co.*, *cit. supra* at p. 960.

[6] See *Heriot's Trust* v. *Caledonian Rly. Co.*, *cit. supra.*

[7] *Fraser* v. *Caledonian Rly. Co.*, *cit. supra.*

[8] Sec. 108.

[9] Sec. 110.

[10] Sec. 111.

SUBSECTION (7).—*Persons Injuriously Affected.*

650. Where no part of a person's lands, or interests in lands, is taken there may still exist a claim for injurious affection to such lands or interests by reason of the execution of the promoters' works. A claim in respect of interference with a servitude right is a claim of this nature. The claim arises in respect of injury to the dominant tenement by the taking in whole or in part of what had been the servient tenement.[10] The servitude is extinguished by the exercise of the compulsory powers.[11] It is an open question whether a superior may have a claim in respect of injurious affection.[12]

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[1] Secs. 93–98.

[2] See *Cunningham* v. *Edinburgh and Northern Rly. Co.*, 1847, 9 D. 1469.

[3] Sec. 93.

[4] Secs. 94, 95, 96.

[5] *Fife and Kinross Rly. Co.* v. *Deas*, 1859, 21 D. 187, 205.

[6] Secs. 56, 97.

[7] Sec. 98.

[8] Sec. 95.

[9] Sec. 94.

[10] *Thicknesse* v. *Lancaster Canal Co.*, 1838, 4 M. & W. 472.

[11] *Town Council of Oban* v. *Callander, etc. Rly. Co.*, 1892, 19 R. 912; *Macgregor* v. *North British Rly. Co.*, 1893, 20 R. 300.

[12] *Caledonian Rly. Co.* v. *Watt*, 1875, 2 R. 917.

651. The Railways Clauses Act,[1] and other Acts dealing with particular classes of undertakings,[2] expressly provide that full compensation is to be paid to the owners of lands taken or used or injuriously affected by the construction of the works, for the value of the lands taken, and for all damage sustained by reason of the exercise of the statutory powers. But the Lands Clauses Act has no such express enactment. It does contemplate purchase-money or compensation for lands taken, or rights or interests therein, and compensation for any permanent damage or injury to such lands.[3] It provides, on compulsory purchase, for an offer to treat for the purchase of the lands required, and "as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works," [4] but this notice only falls to be given to owners, etc., of lands to be taken. It provides for arbitration, in the absence of agreement, between the promoters and the owners or persons enabled to sell and convey "any lands taken or required for or injuriously affected by the execution of the undertaking." [5] It also, in dealing with assessment by verdict of a jury, refers to the sum to be paid for the purchase of the lands required for the works, and the sum to be paid "by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands, by the exercise of the powers." [6] In dealing with assessment by valuation it again alludes to "the purchase-money or compensation to be paid for any lands to be purchased or taken," and "the compensation to be paid for any permanent injury to such lands." [7] It provides, further, that in assessing compensation by the various modes, "regard shall be had not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers." [8]

652. These sections would seem to refer to a person whose lands or interests had been taken. The English Act contains a provision in s. 68, which, after some divergence of judicial opinion,[9] has been held to confer rights of compensation upon persons no part of whose lands or interests has been taken.[1] No precisely similar section is to be found in the Scottish Act [2] and, although there are *dicta* of high authority to the effect that there is no difference in the matter of compensation between Scottish and English legislation,[3] the claim for injurious affection is in practice founded on s. 6 of the Railways Clauses Act or the corresponding provision in one of the other Clauses Acts.[4] There is no substantial distinction between s. 6 of the Railways Clauses Act and s. 68 of the English Lands Clauses Act,[5] but the absence of a section in the Scottish Lands Clauses Act corresponding to s. 68 of the English Act might be material where the Railways Clauses Act or one of the similar Clauses Acts did not apply to the promoters' undertaking.[6]

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[1] 8 & 9 Vict. c. 33, ss. 6, 16.

[2] 10 & 11 Vict. c. 14, s. 6 (Markets); *ibid.*, c. 17, s. 6 (Waterworks); *ibid.*, c. 27, s. 6 (Harbours); *ibid.*, c. 65, s. 6 (Cemeteries).

[3] Sec. 9.

[4] Sec. 17.

[5] Sec. 20.

[6] Sec. 48.

[7] Sec. 56.

[8] Sec. 61.

[9] See *Hammersmith Rly. Co.* v. *Brand*, 1870, L.R. 4 H.L. 171, at pp. 207–9; *Duke of Buccleuch* v. *Metropolitan Board of Works*, 1870, L.R. 5 Ex. 221, at p. 235; *Beckett* v. *Midland Rly. Co.*, 1867, L.R. 3 C.P. 82, at p. 90; *Bush* v. *Trowbridge Waterworks Co.*, 1875, L.R. 19 Eq. 291, at p. 294; and cf. *Macey* v. *Metropolitan Board of Works*, 1864, 33 L.J. Ch. 377, at p. 381; *Broadbent* v. *Imperial Gas, etc. Co.*, 1857, 7 De G. M. & G. at p. 447; *Ferrand* v. *Corpn. of Bradford*, 1856, 21 Beav. 412, at p. 419; *M'Carthy* v. *Metropolitan Board of Works*, 1872, L.R. 7 C.P. 508, at p. 516.

653. Under the combined effect of the Lands Clauses Act and the Railways Clauses Act, or the corresponding provisions of other statutes, the rights of a person whose lands are injuriously affected without any portion thereof being taken are not so large as those of a person whose lands are taken in part and as to the remainder injuriously affected as a result of works executed on the part taken. In the leading Scottish case the position is stated thus: "1. Where the right of action which would have existed, if the work in respect of which compensation is claimed had not been authorised by Parliament, would have been merely personal without reference to land or its incidents, compensation is not due under the Acts. 2. Where damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation. 3. Loss of trade or custom by reason of a work not otherwise directly affecting the house or land upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation. 4. The obstruction by the execution of the work, of a man's direct access to his house or land, whether such access be by a public road or by a private way is a proper subject for compensation." [7]

654. Thus neither personal inconvenience, nor injury to trade, goodwill, or moveable property founds a claim.[8] Injury by user of the works does not entitle to compensation where no part of the claimant's lands has been taken.[1] But where lands, or interests in lands, are depreciated by the execution of the authorised works, then a right to compensation may emerge.[2] But the injury in such a case must be caused by operations which, but for the powers conferred by the special Act, would have been actionable at common law.[3] The injury for which compensation is recoverable must be one arising from the legitimate exercise of the statutory powers, and for any improper exercise the remedy is by civil action.[4] No action can be maintained where the company's operations are conducted in terms of statute.[5]

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[1] *Metropolitan Board of Works* v. *M'Carthy*, 1874, L.R. 7 H.L. 243.

[2] *Cf.* ss. 20, 23, 36.

[3] *Caledonian Rly. Co.* v. *Walker's Trs.*, 1882, 9 R. (H.L.) 19, per Lord Blackburn at p. 32; *Caledonian Rly. Co.* v. *Ogilvy*, 1855, 2 Macq. 229, per Lord St. Leonards at pp. 245, 246.

[4] *Caledonian Rly. Co.* v. *Walker's Trs.*, *cit. supra.* Rubric wrongly refers to s. 6 of Lands Clauses Act instead of Railways Clauses Act; *Law* v. *Caledonian Rly. Co.*, 1851, 13 D. 1122; *Caledonian Rly. Co.* v. *Barr*, 1855, 17 D. 312; *Lawson* v. *Caledonian Rly. Co.*, 1881, 8 R. 442; *Caledonian Rly. Co.* v. *M'Bride*, 1891, 19 R. 255; *Glasgow District Subway Co.* v. *Robertson's Trs.*, 1895, 22 R. 790; *Glasgow District Subway Co.* v. *Albin & Son*, 1895, 23 R. 81; *United Wire Works Co.* v. *Caledonian Rly. Co.*, 1906, 13 S.L.T. 718.

[5] *Ricket* v. *Metropolitan Rly. Co.*, 1867, L.R. 2 H.L. 175 at 189; *City of Glasgow Union Rly. Co.* v. *Hunter*, 1870, 8 M. (H.L.) 156 at 160.

[6] Cf. *Caledonian Rly. Co.* v. *M'Bride*, 1891, 19 R. 255.

[7] *Caledonian Rly. Co.* v. *Walker's Trs.*, 1882, 9 R. (H.L.) 19, at p. 21, per Selborne L.C.

[8] *Caledonian Rly. Co.* v. *Ogilvy*, 1856, 2 Macq. 229; *Ricket* v. *Metropolitan Rly. Co.*, 1867, L.R. 2 H.L. 175; *Hammersmith Rly. Co.* v. *Brand*, 1869, L.R. 4 H.L. 171, at p. 197; *Reg.* v. *Metropolitan Board of Works*, 1869, L.R. 4 Q.B. 358; *Metropolitan Board of Works* v. *M'Carthy*, 1874, L.R. 7 H.L. 243.

SECTION 7.—BASIS OF ASSESSMENT.

655. Compensation for lands taken falls to be assessed upon the basis of the value of the lands to the owner at the date of acquisition and not that of their value to the promoters.[6] Further, "the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined." [7] Accordingly, special adaptability for the purpose desired by the promoters or for some other purpose may give additional value to the land, so long as that special adaptability has not been created solely by the proposed undertaking, and is valued independently of the realised possibility arising from the fact of the promoters having obtained statutory powers.[8] Similarly conditions, restrictions, or limitations affecting the lands taken must be taken into account.[9] But the promoters are not entitled to set off any benefit that may accrue to the remainder of the owner's lands from the construction of the works.[1] Compensation for injurious affection falls to be assessed, subject to the qualifications expressed above, as in any other claim of damages. It is a question of circumstances as to how far promoters may undertake to restrict themselves in the use of the lands acquired so as to reduce the amount of compensation payable by them.[2]

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[1] *City of Glasgow Union Rly. Co.* v. *Hunter*, 1870, 8 M. (H.L.) 156; *Hammersmith Rly. Co.* v. *Brand*, 1869, L.R. 4 H.L. 171; *Holditch* v. *Canadian Northern Ontario Rly.*, [1916] 1 A.C. 536.

[2] *Caledonian Rly. Co.* v. *Walker's Trs.*, *cit. supra*; *Metropolitan Board of Works* v. *M'Carthy*, *cit. supra*.

[3] *City of Glasgow Union Rly. Co.* v. *Hunter*, *cit. supra*; *Fleming* v. *Newport Rly. Co.*, 1883, 10 R. (H.L.) 30; *Caledonian Rly. Co.* v. *Walker's Trs.*, *cit. supra*, at pp. 28, 33, 38; *United Wire Works Co.* v. *Caledonian Rly. Co.*, 1906, 13 S.L.T. 718; *Hammersmith Rly. Co.* v. *Brand*, *cit. supra*; *In re Penny*, 1857, 7 El. & Bl., 660, per Lord Campbell.

[4] *Caledonian Rly. Co.* v. *Colt*, 1860, 3 Macq. 833; *Clyde* v. *Glasgow City and District Rly. Co.*, 1885, 12 R. 1315; *Potter* v. *Hamilton and Strathaven Co.*, 1864, 3 M. 83; *Cooper and Wood* v. *North British Rly. Co.*, 1863, 1 M. 499; *Gilliespie* v. *Lucas & Aird*, 1893, 20 R. 1035; *Lawrence* v. *Great Northern Rly. Co.*, 1851, 16 Q.B. 643.

[5] *Caledonian Rly. Co.* v. *Lockhart*, 1860, 3 Macq. 808, at p. 814; *Watkins* v. *Great Northern Rly. Co.*, 1851, 20 L.J. Q.B. 391; *Muir* v. *Caledonian Rly. Co.*, 1890, 17 R. 1020.

[6] *Fraser* v. *Fraserville (City of)*, [1917] A.C. 186; *Cedar Rapids Manufacturing, etc. Co.* v. *Lacoste*, [1914] A.C. 569; *Penny* v. *Penny*, 1868, L.R. 5 Eq. 227.

[7] *Cedar Rapids Manufacturing, etc. Co.* v. *Lacoste*, *cit. supra* at p. 576.

[8] *Cedar Rapids Manufacturing, etc. Co.* v. *Lacoste*, *ubi cit.*; *Sidney* v. *North-Eastern Rly. Co.*, [1914] 3 K.B. 629; *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; *Bailey* v. *Isle of Thanet Light Rlys. Co.*, [1900] 1 Q.B. 722; *In re Gough and The Aspatria, etc. Water Board*, [1904] 1 K.B. 417.

[9] *Corrie* v. *MacDermott*, [1914] A.C. 1056; *Penny* v. *Penny*, 1868, L.R. 5 Eq. 227; *In re Chandler's Wiltshire Brewery Co.*, [1903] 1 K.B. 569.

SECTION 8.—ACQUISITION OF WATER, WATER RIGHTS, AND SERVITUDES.

SUBSECTION (1).—*Water.*

656. In the Lands Clauses Acts the definition of "lands" is limited to houses, lands, tenements, and heritages of any description or tenure.[3] The Waterworks Clauses Act covers the taking not only of "lands" but also of "streams," which include springs, brooks, rivers, and other running waters.[4] While compensation under the Waterworks Clauses Act falls to be determined in the manner provided by the Lands Clauses Acts, there are certain features of the Waterworks Clauses Act which call for special notice.

657. The Act applies only when specially incorporated by a special Act authorising the construction of waterworks.[5] Where the special Act authorises the undertakers to take or use any lands or streams compulsorily, the undertakers must exercise their power subject to the restrictions of the Waterworks Clauses Act and the Lands Clauses Act, and make compensation to the owners and occupiers and all other parties interested in any such lands or streams, or injuriously affected by the construction or maintenance of the works authorised, or otherwise by the exercise of the powers conferred.[6] The undertakers for constructing the waterworks may within the authorised limits carry out excavations, make and maintain reservoirs and other works, and divert and impound the water from the streams specified in the special Act or deposited plans, and alter the course of such streams, not being navigable, and also take such waters as may be found in or under or on the lands taken, provided that they do as little damage as possible, and where possible provide other watering places, drains, and channels for adjoining lands, and make full compensation to all parties interested for all damage sustained.[7]

658. Unless compensated, owners and occupiers may continue to use the water of streams passing through their lands.[8] Abstraction of water from a stream by the undertakers does not entitle a lower riparian proprietor to have his interest in the stream purchased, but merely to compensation for injurious affection.[1] But diversion of the whole stream entitles the owner of the lands to have its value to him assessed once and for all.[2] Secs. 6 and 12 of the Waterworks Clauses Act are wider than s. 6 of the Railways Clauses Act, and give a right to compensation for injurious affection to lands caused by the user of the works after construction.[3] Fouling of water by undertakers without authority in the special Act does not found a claim for compensation. The remedy must be sought in a civil action.[4]

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[1] *Eagle* v. *Charing Cross Rly. Co.*, 1867, L.R. 2 C.P. 638; *Walker's Trs.* v. *Caledonian Rly. Co.*, 1881, 8 R. 405; *South-Eastern Rly. Co.* v. *London County Council*, [1915] 2 Ch. 252.

[2] *Ayr Harbour Trs.* v. *Oswald*, 1883, 10 R. (H.L.) 85; *Caledonian Rly. Co.* v. *Turcan*, 1898, 25 R. (H.L.) 7; *In re Gonty and Manchester, etc. Rly. Co.*, [1896] 2 Q.B. 439.

[3] Lands Clauses Act, 1845, s. 3.

[4] Waterworks Clauses Act, s. 3.

[5] *Ibid.*, s. 1.

[6] *Ibid.*, s. 6.

[7] *Ibid.*, s. 12.

[8] *Ibid.*, s. 15.

659. A railway company has no right to acquire water compulsorily, and it cannot acquire the right by acquiring land adjacent to and in the bed of a river, and claiming to abstract water as a riparian proprietor.[5] But such a company has power to interfere with or divert the course of a stream for the purposes of constructing the railway or accommodation works, subject to making compensation for all damage done to persons interested.[6]

SUBSECTION (2).—*Servitudes.*

660. While it may be possible for promoters to acquire by agreement a servitude right or wayleave over lands, they cannot compel a landowner, under the Lands Clauses Acts, to grant such a right.[7] Such a power may be given by the terms of the special Act.[8] Under the Waterworks, Gas Works, and Electric Lighting Clauses Acts power is given to undertakers to lay pipes and cables in streets within their area of supply,[9] but not in private land without the consent of the owners and occupiers.[10] But local authorities and water trustees have general statutory power otherwise to acquire a compulsory wayleave for sewerage and water purposes under the Public Health [11] and Burgh Police Acts,[12] and joint electricity authorities and authorised undertakers have a similar power for electricity purposes under the Electricity (Supply) Act, 1919.[13]

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[1] *Bush* v. *Trowbridge Waterworks Co.*, 1875, L.R. 10 Ch. 459.

[2] *Stone* v. *Corpn. of Yeovil*, 1876, 2 C.P.D. 99; *Ferrand* v. *Corpn. of Bradford*, 1856, 21 Beav. 412.

[3] *Fletcher* v. *Birkenhead Corpn.*, [1907] 1 K.B. 205.

[4] *Clowes* v. *Staffordshire Potteries Water Co.*, 1872, L.R. 8 Ch. 125.

[5] *Breadalbane* v. *West Highland Rly. Co.*, 1895, 22 R. 307.

[6] Railways Clauses Act, s. 16; *Maxwell* v. *Glasgow and South-Western Rly. Co.*, 1866, 4 M. 447.

[7] *Pinchin* v. *London and Blackwall Rly. Co.*, 1854, 5 De G. M. & G. 851; *Metropolitan, etc. Rly. Co.* v. *Cosh*, 1880, 13 Ch. D. at p. 616; *Great Western Rly. Co.* v. *Swindon Rly. Co.*, 1884, 9 App. Cas. at pp. 792, 800.

[8] See *Glasgow Coal Exchange Co.* v. *Glasgow City and District Rly. Co.*, 1883, 10 R. 1283.

[9] See *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1897, 25 R. 370; *Kirkcaldy District Committee* v. *Buckhaven, etc. Gas Commrs.*, 1925 S.N. 54.

[10] 10 & 11 Vict. c. 17, ss. 28, 29 (water pipes); 10 & 11 Vict. c. 15, ss. 6, 7 (gas pipes); 45 & 46 Vict. c. 56, s. 12 (2), 62 & 63 Vict. c. 19, s. 11 (electric cables). See *Mags. of Glasgow* v. *Glasgow and South-Western Rly. Co.*, 1895, 22 R. (H.L.) 29 (no right to sling pipes from private bridges, etc.); *Caledonian Rly. Co.* v. *Corpn. of Glasgow*, 1901, 3 F. 526 (no right to break into railway tunnel.)

[11] 60 & 61 Vict. c. 38, ss. 103–6, 126 (4); 1 & 2 Geo. V. c. 30.

[12] 1 Edw. VII. c. 24, s. 5; 55 & 56 Vict. c. 55, s. 219.

[13] 9 & 10 Geo. V. c. 100, s. 22; see also 16 & 17 Geo. V. c. 51, s. 21.

Where sewers or pipes "vest" in the local authority the accruing right may confer not a wayleave, but a right of property in the subsoil.[1] The acquisition of land may carry with it a right of access to the land acquired.[2]

661. While promoters may have no right to acquire a right of the nature of a servitude, the acquisition of land under their compulsory powers will, in the absence of any saving provision in their special Act, result in the extinction of all servitude rights over the land acquired.[3] The acquisition by user of a servitude right over the lands of the promoters is likewise impossible.[4]

SECTION 9.—ACQUISITION OF MINERALS.

SUBSECTION (1).—*General.*

662. Minerals[5] fall under the definition of "lands" in the Lands Clauses Acts.[6] But as promoters are not bound to acquire the whole of the lands authorised to be taken or to take all that they require at the one time,[7] so they are not bound to acquire the minerals under the surface, and if they choose to do so they may acquire them at any time within the period of compulsory purchase.[8] In the absence of stipulation to the contrary, the undertakers are entitled to carry away such minerals in the subsoil as it is necessary to excavate in the course of executing their works.[9] If the minerals are not acquired, the mine-owner may still have a claim in respect that his mineral rights have been injuriously affected.[10] Such a claim may emerge, at least where the owner of the surface is owner of the minerals, in respect of the natural obligation of support cast upon him by the creation of the new right of ownership in the surface.

663. Under a statutory title and where the provisions of the special code to be now noticed do not apply, the law assumes that the Legislature intended to give a right of support subject to the payment of compensation.[11] Similarly under a voluntary conveyance to statutory undertakers there is, in the absence of stipulation to the contrary, a right to support from the granter and his successors.[1] The rights of parties may be varied by the terms of the special Act.[2]

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[1] *Taylor* v. *Oldham Corpn.*, 1876, 4 Ch. D. 395, at p. 411; *Thurrock, etc. Sewerage Board* v. *Thames Land Co.*, 1925, 23 L.G.R. 648; and see *Scott* v. *Mags. of Dunoon*, 1909 S.C. 1093.

[2] *Scott* v. *Edinburgh, etc. Rly Co.*, 1848, 11 D. 91; cf. *M'Laren* v. *City of Glasgow Union Rly. Co.*, 1878, 5 R. 1042.

[3] *Town Council of Oban* v. *Callander and Oban Rly. Co.*, 1892, 19 R. 912; *MacGregor* v. *North British Rly. Co.*, 1893, 20 R. 300.

[4] *Mags. of Edinburgh* v. *North British Rly. Co.*, 1904, 6 F. 620.

[5] For meaning of "Minerals" see MINES AND MINERALS.

[6] *Smith* v. *Great Western Rly. Co.*, 1877, 3 App. Cas. 165; *Holliday* v. *Mayor of Wakefield*, [1891] A.C. 81.

[7] See *supra*, para. 622. [8] *Errington* v. *Metropolitan Rly. Co.*, 1881, 19 Ch. D. 559.

[9] *Mags. of Glasgow* v. *Farie*, 1888, 15 R. (H.L.), at p. 101; *Nisbet-Hamilton* v. *North British Rly. Co.*, 1886, 13 R. 454; cf. *Jamieson* v. *North British Rly. Co.*, 1868, 6 S.L.R. 188; *Hopetoun* v. *North British Rly. Co.*, 1893, 20 R. 704; *Davidson's Trs.* v. *Caledonian Rly. Co.*, 1895, 23 R. 45. See also 8 & 9 Vict. c. 33, s. 70; 10 & 11 Vict. c. 17, s. 18.

[10] *Holliday* v. *Mayor of Wakefield, ubi cit.*, per Lord Watson, at pp. 97, 98; *In re Corporation of Dudley*, 1881, 8 Q.B.D. 86; *supra*, para. 650 *et seq.*

[11] *Edinburgh and District Water Trs.* v. *Clippens Oil Co.*, 1900, 3 F. 156; 1903, 6 F. (H.L.) 7; *London and North-Western Rly. Co.* v. Evans, [1893] 1 Ch. 16.

SUBSECTION (2).—*The Mining Code.*

664. In the case of certain undertakings, the right to claim compensation has been modified, or at least deferred, by the provisions of the Railways Clauses Consolidation (Scotland) Act, 1845,[3] and the Waterworks Clauses Act, 1847.[4] These provisions may be applied by, or similar provisions be incorporated in, the special Acts applicable to various undertakings. The undertakings to which they almost invariably apply are railways,[5] waterworks, and sewers and other works under the Public Health Acts.[6]

665. The effect of these provisions is to provide a statutory exception of minerals unless the same shall have been expressly purchased.[7] If the mine-owner wishes to work the minerals under or within the prescribed distance [8] of the undertakers' works, he must give thirty days' notice of his intention, whereupon the undertakers may send him a counter-notice to leave the minerals unworked upon payment of compensation.[9] The sending of this counter-notice creates a contract upon which the statutory consequences follow.[10] If no counter-notice is given, the mine-owner may proceed to work the minerals within the prescribed area.[11] Under the Waterworks Clauses Act maps or plans of all pipes and underground works or copies thereof must be kept at the undertakers' office, and deposited with the sheriff clerk and be available for inspection.[12] Compliance with this provision is a condition precedent to the mine-owner being bound to give notice of intention to work his minerals under such pipes or underground works.[13] Under the Railways Clauses Act the mine-owner may work the minerals in such manner as he thinks fit. The Waterworks Clauses Act provides that he may work the mines "as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner." The onus is on the undertakers to prove working in an unusual manner.[1]

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[1] *Sprot* v. *Caledonian Rly. Co.*, 1856, 9 Macq. 449 (grant before date of Railways Clauses Act); *Aitken's Trs.* v. *Rawyards Colliery Co.*, 1894, 22 R. 201; *North British Rly. Co.* v. *Turners, Ltd.*, 1904, 6 F. 900 (on footing that clay not a mineral).

[2] See *Marquis of Linlithgow* v. *North British Rly. Co.*, 1914 S.C. (H.L.) 38.

[3] 8 & 9 Vict. c. 33.

[4] 10 & 11 Vict. c. 17.

[5] As amended in the case of railways by 13 & 14 Geo. V. c. 20. See below, para. 672 *et seq.*

[6] These last under 60 & 61 Vict. c. 38, ss. 4 and 145 (4).

[7] Railways Clauses Act, s. 70; Waterworks Clauses Act, s. 18.

[8] Forty yards if no distance prescribed in the special Act.

[9] Railways Clauses Act, s. 71; Waterworks Clauses Act, s. 22.

[10] *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1901, 3 F. 1113; affd. 4 F. (H.L.) 40.

[11] Railways Clauses Act, s. 72; Waterworks Clauses Act, s. 23.

[12] Waterworks Clauses Act, ss. 19–21.

[13] *Ibid.*, s. 22; *South Staffordshire Waterworks Co.* v. *Mason & Sons*, 1886, 56 L.J. Q.B., 255.

666. These provisions do not prevent the undertakers acquiring the minerals by the ordinary exercise of their compulsory powers.[2] But where they do not do so, the mine-owner's claims for compensation are in general postponed until the conditions arise entitling him to claim compensation under the special code.[3]

667. Where this special code applies and lands are compulsorily acquired by undertakers from a proprietor who also owns the underlying minerals, these lands are not entitled to the natural right of subjacent support in so far as that depends upon the minerals under the undertakers' works and the prescribed distance therefrom,[4] and the mine-owner's rights may extend even to working from the surface and entering the undertakers' lands for that purpose.[5] But at least as in a question between purchaser and seller, the undertakers acquire the ordinary right to lateral support outside the prescribed area.[6] And even as regards subjacent minerals, the undertakers may have a right of support where there was a severance of the ownership of surface and minerals at the date of the acquisition.[7] If the undertakers having no right to support from subjacent minerals wish to obtain such, they must, under the special code, put an embargo on their being worked, but they are not bound to purchase this support simply because the mine-owner apprehends that injury may be caused to his mine by working under the undertaker's property.[8] It is uncertain how far the code operates in the matter of support where the conveyance to the undertakers is a voluntary one. Under the Waterworks Clauses Act, and in a question with an adjacent proprietor, no right exists to withdraw support even within the prescribed limit from lands held by undertakers under a voluntary conveyance.[9] But under the Railways Clauses Act, and in a question with a successor of the seller, it has been held that there is no greater right of support given to the undertakers under a voluntary than under a statutory conveyance.[10]

668. Undertakers are not debarred, by failure to give their counter-notice within thirty days, from subsequently giving notice so as to stop further working.[11] Conversely a person working the minerals without giving the statutory notice is not debarred from giving notice of intention to work the minerals which are still left.[1] Notice of intention to work must be given *bona fide*.[2]

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[1] *Edinburgh and District Water Trs.* v. *Clippens Oil Co.*, 1898, 25 R. 504.

[2] *Errington* v *Metropolitan, etc. Rly. Co.*, 1881, 19 Ch.D. 559.

[3] *Holliday* v. *Mayor of Wakefield*, [1891] A.C. 81; *In re Gerard, etc.*, [1895] 1 Q.B. 459; cf. *Davies* v. *James Bay Rly.*, [1914] A.C. 1043.

[4] *Great Western Rly. Co.* v. *Bennett*, 1867, L.R. 2 H.L. 27; *Mags. of Glasgow* v. *Farie*, 1888, 15 R. (H.L.) at 99; cf. *Davies* v. *James Bay Rly.*, *cit. supra.*

[5] *Midland Rly. Co.* v. *Robinson*, 1889, 15 App. Cas. 19; *Ruabon Brick, etc. Co.* v. *Great Western Rly. Co.* [1893] 1 Ch. 427.

[6] *Howley Park, etc. Co.* v. *London and North-Western Rly. Co.*, [1913] A.C. 11.

[7] *Consett Waterworks Co.* v. *Ritson*, 1889, 22 Q.B.D. 318.

[8] *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1887, 24 S.L.R. 398.

[9] *New Moss Colliery* v. *Manchester Corpn.*, [1908] A.C. 117.

[10] *Caledonian Rly. Co.* v. *Henderson*, 1876, 4 R. 140.

[11] *Dixon, Ltd.* v. *Caledonian Rly. Co.*, 1880, 7 R. (H.L.) 116.

SUBSECTION (3).—*Compensation under the Mining Code.*

669. Compensation must be made for stopping the working of minerals and for all loss and damage occasioned thereby to the owner, lessee, or occupier thereof respectively, to be settled failing agreement as in other cases of disputed compensation.[3] While the notice and counter-notice pass only between the person actually working the minerals and the undertakers, compensation may fall to be paid to both the lessor and the lessee of the minerals.[4] The compensation does not represent the purchase price of the minerals, but the profit which could have been made out of the minerals if they had been worked,[5] and interest can only run as from the date of the award.[6] It is irrelevant that there are other minerals which could equally well be worked, and that the whole minerals could not be worked out during the period of the lease.[7] In arriving at the profits, extra costs due to the existence of the undertaking should be excluded.[8] Regard may be had to any special value that the minerals have to the person working them.[9] Payment of compensation does not entitle the undertakers to a conveyance of the minerals.[10] And the compensation falls to be paid by the undertakers owning the surface and not by persons carrying on the undertaking for them under an agreement to maintain the same in good working order and condition.[11]

670. The undertakers must also make compensation for all such additional expenses and losses as shall be incurred by reason of severance or of the continuous working of the mines being interrupted, or by reason of the same being worked so as not to injure the undertaker's works, and for any minerals not purchased by the Company which cannot be obtained by reason of the making of the works;[12] and also, in the case of railways, to the owner of the surface for any surface damage caused by the making of any airway or other work necessary for the mines, and occasioned by the stoppage of working under the railway.[1] The claim for compensation under s. 74 of the Railways Clauses Act in respect of minerals which cannot be obtained because of the making of the works has been held to be independent of any claim under s. 71 for stopping of working.[2]

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[1] *Edinburgh and District Water Trs.* v. *Clippens Oil Co.*, 1898, 25 R. 504.

[2] *Midland Rly. Co.* v. *Robinson*, 1889, 15 App. Cas. 19; *Glasgow and South-Western Rly. Co.* v. *Bain*, 1893, 21 R. 134; *North British Rly. Co.* v. *Budhill Coal Co.*, 1909 S.C. 277.

[3] Railways Clauses Act, s. 71; Waterworks Clauses Act, s. 22.

[4] *Smith* v. *Great Western Rly. Co.*, 1877, 3 App. Cas. 165; *Eden* v. *North-Eastern Rly. Co.*, [1907] A.C. 400, at pp. 408, 409.

[5] *Bwllfa, etc. Collieries* v. *Pontypridd Waterworks*, [1903] A.C. 426; *Eden* v. *North Eastern Rly. Co.*, [1907] A.C. 400; *Farie* v. *Farie's Tutor*, 1920 S.C. 276.

[6] *In re Richard and Great Western Rly. Co.*, [1905] 1 K.B. 68.

[7] *Eden* v. *North-Eastern Rly. Co.*, *ubi cit.*

[8] *Scott* v. *Caledonian Rly. Co.*, 1904, 11 S.L.T. 779.

[9] *Rugby Portland Cement Co.* v. *London and North-Western Rly. Co.*, [1908] 2 K.B. 606.

[10] *Hamilton's Trs.* v. *Caledonian Rly. Co.*, 1905, 7 F. 847.

[11] *North British Rly.* v. *Forth Bridge Rly. Co.*, 1922 S.C. 215.

[12] Railways Clauses Act, s. 74; Waterworks Clauses Act, s. 25. See *Whitehouse* v. *Wolverhampton Rly. Co.*, 1869, L.R. 5 Ex. 6; *Midland Rly. Co.* v. *Miles*, 1885, 30 Ch. D. 635.

671. Under s. 27 of the Waterworks Clauses Act, and independently of any right to compensation, there may arise a right of action or other legal proceeding, for damage or injury done to any mines by means or in consequence of the waterworks, for which the undertakers would have been liable if the works had not been constructed or maintained under statute. This right of action would seem to be irrespective of any fault or negligence on the part of the undertakers.[3]

SUBSECTION (4).—*Substituted Code for Railways.*

672. An important modification of the mining provisions of the Railways Clauses Act has been made by the Mines (Working Facilities and Support) Act, 1923.[4] Part II. of that Act substitutes for railways a new code which takes the place of ss. 71 to 78 of the Railways Clauses Act. The original provisions, however, still regulate the rights of parties in undertakings other than railways to which the Railways Clauses Acts are applicable.[5] The substituted code applies in every case where the Railways Clauses Act is incorporated in any Act, order, or other instrument relating to a railway company passed or made after 18th July 1923, except as otherwise expressly provided.[6] And subject to some minor modifications it also applies where the Railways Clauses Act or a similar code has been incorporated or enacted prior to the passing of the Act of 1923, if the prescribed limit under the earlier code is forty yards.[7]

673. The following are the chief changes made by the new code:—

1. Notice of intention to work must be given to the royalty owner as well as to the company.[8]
2. In the counter-notice the company shall specify not only the minerals which they require to be left unworked (called the "specified minerals") but also the portion of the railway for which they wish protection (called the "protected works").[9]

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[1] Railways Clauses Act, ss. 73, 75.

[2] *Glasgow, etc. Rly. Co.* v. *Nitshill Coal Co.*, 1848, 11 D. 327.

[3] See *Holliday* v. *Mayor of Wakefield*, [1891] A.C. 81, at pp. 87, 101; *Craigola Merthyr Co.* v. *Swansea Corpn.*, [1927] W.N. 190.

[4] 13 & 14 Geo. V. c. 20.

[5] *E.g.* Sewers, etc. under Public Health Act; Houses under Housing Act.

[6] 13 & 14 Geo. V. c. 20, s. 15.

[7] Sec. 16.

[8] N.C., 78 (1); *cf.* O.C., 71. *Note.*—For convenience the sections of the New Code are given as applicable to England; see s. 17 for application to Scotland.

[9] N.C., 78 (2); *cf.* O.C., 71.

3. The mine-owner must send a copy of the counter-notice to the royalty-owner (if any).[1]
4. The prescribed limit (called the "area of protection") comprises the railway and works, and such a lateral distance therefrom as is equal to one-half of the depth of the seam, or forty yards, whichever be the greater. Where this distance exceeds forty yards the area "of protection" is divided into two areas—the inner area comprising the distance of forty yards from the railway, and an outer area consisting of the remaining distance.[2]
5. Compensation is payable to the mine-owner and royalty-owner to be determined by arbitration,[3] and separately assessed.[4]
6. The compensation payable to the mine-owner is a sum for each ton of the specified minerals, the rate per ton of minerals under the outer area of protection being one-third of the rate for minerals lying under the inner area of protection.[5]
7. The compensation payable to the royalty-owner is the royalty paid under the lease in respect of minerals within the inner area, and a royalty of one-third that amount *plus* a third of a penny per ton in respect of minerals under the outer area.[6]
8. Any additional cost of working the minerals, other than the specified minerals, caused by failure to give timeous counter-notice, must also be paid by the company to the mine-owner.[7]
9. If no counter-notice is given within thirty days the mine-owner may, until a counter-notice is served, work the minerals "in the manner proper and necessary for the beneficial working thereof, and according to the usual manner of working" in the district.[8] The same rule applies where the counter-notice specifies only part of the minerals under the works.[9]
10. Even where the mine-owner is not stopped from working he must contribute to the cost of making good any damage to the railway caused by such working according to the percentage scale set forth in the First Schedule to the Act.[10] But his total contribution in respect of any part of the railway on which expenditure has been incurred must not exceed sixpence per ton of the commercially workable minerals within an area ascertained in accordance with the Second Schedule to the Act.[11] And when the aggregate of sums paid by him in satisfaction of such liability is equivalent to sixpence per ton of commercially workable minerals within such further area as is prescribed in s. 79 A (4) of the new code no further contribution can be

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[1] N.C., 78 (3).

[2] N.C., 78 (5); *cf.* O.C., 71.

[3] Not as formerly under the Lands Clauses Acts.

[4] N.C., 78 (4), 78 A (1); *cf.* O.C., 71.

[5] N.C., 78 A (1) (ii).

[6] N.C., 78 A (1) (iii).

[7] N.C., 78 A (2).

[8] The code here adopts the language of the original English Railways Clauses Act. *Cf.* the former wording in Scotland, *supra*, para. 665.

[9] N.C., 79 (1).

[10] N.C., 79 A (1).

[11] N.C., 79 A (2).

demanded at all in respect of damage occasioned by workings in any single mine.[1]

11. Provision is made for contribution as between the mine-owner and the royalty-owner by way of deduction from the royalty;[2] and all questions of dispute as between the company, the mine-owner, and the royalty-owner fall to be settled by arbitration.[3] Provision is also made for notice being given by the company of damage, or apprehended damage, to their works, and for separate accounts of expenditure on such damage being kept by the company.[4]
12. Where counter-notice has been given, the company must pay to the mine-owner compensation for additional expenses caused by interruption of continuous working, or restriction in working, upon a percentage basis set forth in the Third Schedule of the Act.[5]
13. Parties are empowered to modify their statutory rights by agreement and provision is made for the case of existing agreements.[6]

674. The Act contains important provisions with regard to the law of support. Where the mine-owner or royalty-owner has right, derived from a title antecedent to the acquisition by the company of their interest in the surface, or conferred by reservation in the grant to the company, to let down the surface, and notice of intention to work is given and no counter-notice served, he is discharged from all the restrictions and provisions of the Act, except that against improper working: if counter-notice is served his rights to compensation for stoppage are increased by the whole of the specified minerals being deemed to be under the inner area of protection, and the percentage allowance for additional damage caused by severance is also increased.[7] Further, save as provided in the Act or the special Act or under express agreement between the company and the mine-owner, the latter, as between himself and the company, shall not be under any liability to leave support either inside or outside the area of protection, and shall be entitled to remove such support without being liable for any damage thereby caused to the railway or works; but the removal shall be done in a manner proper and necessary for the beneficial working of the minerals, and according to the usual manner of working minerals in the district.[8]

SECTION 10.—APPLICATION OF COMPENSATION.

SUBSECTION (1).—*Persons under Disability.*

675. The application of compensation payable to parties having limited interests and to parties prevented from treating or not making out a title is dealt with in two separate *fasciculi* of sections, commencing respectively at ss. 67 and 75 of the Lands Clauses Act, 1845. Parties having limited interests are those persons under disability enabled to sell and convey under s. 7 of the Act. Among such persons are corporations, but corporations do not include railway companies, nor presumably other joint stock companies or companies registered under the Companies Acts.[1] Compensation payable to persons under disability must be paid into bank, to be applied under the authority of the Court of Session to certain specified purposes.[2] "Bank" means one of the incorporated or chartered banks in Scotland.[3]

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[1] N.C., 79 A (4).
[2] N.C., 79 A (3) (4) (5).
[3] N.C., 79 A (6).
[4] N.C., 79 B.
[5] N.C., 81.
[6] N.C., 85 A, 85 B (1).
[7] N.C., 85 B (2).
[8] N.C., 85 E.

676. The specified purposes are—

(i) Redemption of land tax,[4] discharge of encumbrances affecting the land in respect of which the money is paid or other lands settled therewith,[5] or affecting succeeding heirs of entail. The Court has refused to give authority to uplift money to be spent in improvement expenditure.[6] But where improvement expenditure has been duly constituted a debt on the lands under the Entail Acts, consigned money may be applied towards extinction of the debt.[7]

(ii) The purchase of other lands to be settled in the same manner as the lands in respect of which the money is paid.[8] Lands so purchased are considered as held under the original entail.[9] The purchase price, in payment of which the consigned money will be authorised to be applied, in the case of an entailed estate, must be the price of the lands exclusive of the value of minerals, timber, and houses, other than the mansion-house and houses required for the purposes of agriculture.[10] In an exceptional case of an educational trust the Court authorised consigned money to be applied in rebuilding a ruinous house.[11] Reinvestment in lands covers the purchase of feu-duties.[12] Provision for making up title to the new lands is contained in s. 73.

(iii) If the compensation is paid in respect of buildings taken or injured, in removing or replacing such buildings or substituting others in their stead in such manner as the Court shall direct.

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[1] *Caledonian Rly. Co.* v. *City of Glasgow Union Rly. Co.*, 1869, 7 M. 1072.

[2] Sec. 67. [3] Sec. 3; *Methven's Exrs.* v. *Edinburgh, etc. Rly. Co.*, 1851, 13 D. 1262.

[4] *Ex parte Northwick*, 1834, 1 Y. & C. 166 (reimbursement of tax already redeemed).

[5] Cf. *Bruce Murray*, 1920, 2 S.L.T. 183. [6] *Mags. of Dumbarton*, 1852, 14 D. 673.

[7] *Marquis of Bute*, 1847, 19 Sc. Jur. 414; *Grant* v. *Edinburgh, Perth and Dundee Rly. Co.*, 1851, 13 D. 1015; *Baird*, 1903, 11 S.L.T. 31.

[8] See *Duff*, 1863, 2 M. 117, authority given where lands purchased before payment of compensation.

[9] *Buchanan*, 1864, 2 M. 1197.

[10] *Duke of Hamilton*, 1858, 20 D. 1134; *Oswald*, 1875, 2 R. 931.

[11] *Blair's Trs.*, 1852, 14 D. 496.

[12] *Presbytery of Ayr*, 1842, 4 D. 630; *Stewart*, 1875, 12 S.L.R. 303.

(iv) Payment to any person becoming absolutely entitled to such money. Trustees with a power of sale or holding under direction to entail on expiry of a liferent, have been held to come within this category.[1] A tercer is entitled to payment out of consigned money of such sum as would purchase her an annuity equal to the value of her terce,[2] and an heiress of entail to compensation for coal to the royalties on the working of which she would have otherwise been entitled.[3]

The corresponding provisions of the English statute have received a liberal construction in England where the purposes proposed were, if not strictly within the terms of the statute, yet of a closely kindred nature.[4]

677. The compensation falls to be so applied on an order of the Court made on the petition of the party who would have been entitled to the rents of the lands; and until it can be so applied, it must be kept in bank or invested in the public funds [5] or in heritable securities, the interest or proceeds being paid to the party who would have been entitled to the rents.[6] Authority has been given to lend consigned money belonging to an entailed estate to the heir of entail in possession on the security of a fee-simple estate.[7]

678. If the compensation is less than £200 and more than £20, it falls to be paid to two trustees nominated by the parties entitled to the rents of the lands, and to be applied (without recourse to the Court) by the trustees to the purposes specified in the case of the larger consigned sums. In the case of coverture, infancy, lunacy, or other incapacity, the nomination may be made by the guardian of the party entitled, and payment made to the trustees so appointed, but only with the approval of the undertakers.[8] Sums which do not exceed £20 are paid directly to the parties entitled to the rents for their own use and benefit, or, in case of incapacity, to those who represent them.[9]

679. Compensation payable, in cases of purchase by agreement, to persons not absolutely entitled, also falls to be paid into bank or to trustees nominated under s. 69 to account of all the parties interested in the lands, but the Court or trustees may allot to any liferenter, or other person holding a partial or qualified right or interest, a portion of the sum as compensation for any special injury, inconvenience, or annoyance he may be considered to sustain.[1] The sum to be paid for inconvenience or annoyance cannot be fixed and paid over by agreement. It must be fixed by the Court.[2] Costs incurred beyond those recovered from the promoters would appear to fall under the category of special injury and to found a claim under the proviso to this section.[3]

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[1] *Williamson's Trs.*, 1903, 11 S.L.T. 288, and cases there cited; *Manuel's Trs.*, 1893, 30 S.L.R. 658; cf. *Baird's Trs.*, 1882, 19 S.L.R. 604.

[2] *Burke* v. *Burke*, 1904, 12 S.L.T. 180.

[3] *Ruthven* v. *Hamilton's Curator Bonis*, 1881, 18 S.L.R. 724; *Farie* v. *Farie's Tutor*, 1920 S.C. 276.

[4] See cases referred to in Deas, Law of Railways, 392, 393; also *In re Coleraine Rural District Council*, [1903], 1 I.R. 447.

[5] Municipal loans not "public funds" (*Kirk's Trs.*, 1904, 12 S.L.T. 528), but see *Dickson's Trs.*, *cit. infra*.

[6] Sec. 68; *Dickson's Trs.*, 1889, 16 R. 519.

[7] *Earl of Rosebery*, 1888, 15 R. 824; cf. *Innes*, 1848, 10 D. 870.

[8] Sec. 69; see *In re Kinsey*, 1863, 1 N.R. 303 (unapplied balance of larger sum).

[9] Sec. 70; *In re Bateman*, 1852, 21 L.J. Ch. 691; *In re Lord Egremont*, 1848, 12 Jur. 618.

680. Where money consigned has been paid in respect of long leases or reversions, the Court may direct the application of the money as it thinks just.[4]

SUBSECTION (2).—*Recalcitrant and Absent Persons.*

681. If the owner refuses to accept the compensation, or neglects or fails to make out a title, or if he refuses or is unable validly to convey or to discharge an incumbrance or if he is absent from the kingdom, or cannot after diligent inquiry be found, or fails to appear at the trial where the assessment is by a jury, the company must deposit the compensation, and may make up their title by notarial instrument.[5] The owner is not in such default as to justify this procedure if he is able and willing to make up his title, and only the requisite forms of law require to be carried through,[6] nor can promoters proceed under this section so as to acquire a title *a non domino*.[7] Money so deposited may be invested, or distributed and paid over on summary application to the Court on the petition of any party preferring a claim to the same;[8] and in all questions relating to the title to lands the party in possession as owner is to be deemed the owner until the contrary is shown to the satisfaction of the Court, and he and all persons claiming under him shall be deemed entitled to the money so deposited.[9] As regards money consigned in respect of the acquisition of glebe lands these provisions have not been superseded by the terms of the Church of Scotland (Property and Endowments) Act, 1925.[10]

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[1] Sec. 71; *Mansfield* v. *Glasgow, etc. Rly. Co.*, 1850, 13 D. 235.

[2] *Stewart* v. *Scottish North-Eastern Rly. Co.*, 1859, 3 Macq. 382, at pp. 416, 417; *In re Saunderton Glebe Lands*, [1903] 1 Ch. 480.

[3] *In re Earl of Berkeley's Will*, 1874, L.R. 10 Ch. 56.

[4] Sec. 72.

[5] Secs. 75 and 76; *Wardlaw Ramsay*, 1903, 10 S.L.T. 691 (land burdened with provisions for younger children); see also *Midland Rly. Co.*, [1904] 1 Ch. 61.

[6] *Graham* v. *Caledonian Rly. Co.*, 1848, 10 D. 495; see also *Miles* v. *North British Rly. Co.*, 1867, 5 M. 402; *Thomson* v. *North British Rly. Co.*, 1867, 5 M. 410.

[7] *Wells* v. *Chelmsford Local Board of Health*, 1880, 15 Ch. D. 108.

[8] Sec. 77.

[9] Sec. 78; *Methven's Exrs.* v. *Edinburgh, Perth, and Dundee Rly. Co.*, 1851, 13 D. 1262; see also *In re St. Pancras Burial Ground*, 1866, L.R. 3 Eq. 173, at p. 183.

[10] *Milligan, Petr.*, 1927 S.N. 76.

SUBSECTION (3).—*Expenses in Connection with Consigned Money.*

682. In all cases [1] of deposited compensation, except where the procedure has been necessitated by wilful refusal to receive the compensation or convey the lands, or by refusal or inability to discharge a burden, or by failure or neglect to make out a good title, the Court of Session may order certain expenses to be paid by the company.[2] "Wilful refusal" means a refusal "without reasonable grounds." [3] To disentitle the landowner to expenses the consignation must have been "by reason of" the failure or neglect to make out a title,[4] and the company is liable for all additional expenses caused by unsuccessful objections to the title offered.[5]

683. The statute specifies the following charges:—

(i) The expenses of the purchase or taking of the lands, or those incurred in consequence thereof, except in so far as otherwise [6] provided for.[7] This has been held in England to cover the expenses of applying to the Court for a new scheme made necessary by the acquisition of lands belonging to a charitable trust.[8]

(ii) The expenses of investment in Government or real securities, and the reinvestment thereof in the purchase of other lands, and of re-entailing such lands, and incident thereto.[9] Investment in government or real security is frequently of the nature of a temporary investment.[1] A change of a temporary investment may be authorised at the expense of the promoters.[2] Where several companies have taken portions of the claimant's lands, the price of which is reinvested on one application, the general rule is that the expenses are divided equally and not rateably between the companies,[3] but the rule is one subject to equitable modification.[4]

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[1] See ss. 67, 75, 84. Not in case of persons entitled absolutely (*Manuel's Trs.*, 1893, 30 S.L.R. 658).

[2] Sec. 79. See *Mansfield* v. *Glasgow, etc. Rly. Co.*, 1850, 13 D. 235, as to exclusion of expenses by agreement.

[3] *In re East India Docks, etc. Rly. Act*, 1848, 16 Sim. 174; *In re Windsor, Staines, and Great Western Rly. Act*, 1850, 12 Beav. 522.

[4] *Moncrieff* v. *Edinburgh and Glasgow Rly. Co.*, 1857, 19 D. 283.

[5] *Miles* v. *North British Rly. Co.*, 1867, 5 M. 402; *Thomson* v. *North British Rly. Co.*, 1867, 5 M. 410.

[6] *E.g.* under ss. 32, 50, 60, 66, 81, 82.

[7] See *Primrose* v. *Caledonian Rly. Co.*, 1848, 11 D. 236; *Charlton* v. *Rolleston*, 1885, 28 Ch. D. 237; *Saltoun* v. *Great North of Scotland Rly. Co.*, 1906, 14 S.L.T. 370.

[8] *In re Wood Green Gospel Hall Charity*, [1909] 1 Ch. 263.

[9] EXPENSES AUTHORISED.—*Grant* v. *Edinburgh, etc. Rly. Co.*, 1851, 13 D. 1015; *Torphichen* v. *Caledonian Rly. Co.*, 1851, 13 D. 1400 (application to apply money towards improvements on entailed estate); *Titchfield* v. *Glasgow and South-Western Rly. Co.*, 1853, 15 D. 908 (expenses of entry with superior of substituted lands); *M'Lean*, 1902, 10 S.L.T. 282 (commission of one-half per centum to agents for trouble of obtaining a reinvestment); *Inglis* v. *Caledonian Rly. Co.*, 1899, 1 F. 747 (expenses of application to uplift stock, expenses of transfer and expenses of discharge in favour of transferor); *Blythswood* v. *Glasgow and South-Western Rly. Co.*, 1914 S.C. 726 (expenses of remits to reporters in connection with application to uplift and re-entail). As to brokerage charges, see *In re Gaselee*, [1901] 1 Ch. 923; and *In re Magdalen College*, [1901] 2 Ch. 786. EXPENSES REFUSED.—*Torphichen* v. *Caledonian Rly. Co.*, 1851, 13 D. 1400; *Erskine* v. *Aberdeen Rly. Co.*, 1851, 14 D. 119; *Hay* v. *North British Rly. Co.*, 1873, 1 R. 180 (expenses of constituting claim to cost of improvements against heirs of entail); *Pollok* v. *Glasgow Waterworks Comrs.*, 1869, 41 Sc. Jur. 325; *Stirling Stuart* v. *Caledonian Rly. Co.*, 1893, 20 R. 932 (expenses of discharge of debt secured upon the lands); cf. *Saltoun* v. *Great North of Scotland Rly. Co.*, 1906, 14 S.L.T. 370, which seems distinguishable on the ground that the deed of restriction there was an expense connected with the purchase or taking of the lands, see (i) *supra*; *Manuel's Trs.*, 1893, 30 S.L.R. 658 (expenses of investing in securities authorised by trust deed); *Lady Willoughby de Eresby* v. *Callander and Oban Rly. Co.*, 1885, 13 R. 70; *Blythswood* v. *Glasgow and South-Western Rly. Co.*, *cit. supra*; *Buchanan* v. *North*

(iii) The expenses of obtaining the proper orders for any of these purposes, and orders for payment of dividends and interest and for the payment of the principal, and of all proceedings relating thereto, except those occasioned by litigation between adverse claimants.[5] The undertakers are, however, liable only for expense in so far as caused by their actings, and not for exceptional expense occasioned by other causes, or by irregularity or difficulty in procedure.[6] Where expenses are not recoverable against the promoters it would seem that they cannot be chargeable against the consigned fund.[7]

(iv) The Act only allows the expenses of one application for reinvestment in land, unless it appears to the Court that it is for the benefit of the parties interested in the compensation that it should be invested in the purchase of lands in different sums and at different times, in which case the Court may in its discretion order the expenses to be paid by the promoters.[8] The expenses of reinvestment for temporary purposes, while not specially dealt with in the statute, are in practice also in the discretion of the Court.[9]

SECTION 11.—CONVEYANCES.

684. Sections 74 and 76 of the statute should be considered under this head, although they do not so find place in the Act itself. Sec. 74 provides that on deposit in bank of the compensation agreed or awarded the owner shall when required to do so convey the lands to the promoters, and in default, or if he fail to adduce a good title, the promoters may

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British Rly. Co., 1905, 12 S.L.T. 764 (expenses of service of application upon next heirs of entail); cf. *Countess of Stair*, 1882, 19 S.L.R. 618; and *Lord Hamilton*, 1903, 11 S.L.T. 64; but see also *Baird*, 1903, 11 S.L.T. 31; *Lord Hamilton of Dalzell* v. *Caledonian Rly. Co.*, 1914, 1 S.L.T. 476 (expenses of repayment of improvement expenditure); *Earl of Morton* v. *Mags. of Edinburgh*, 1917, 1 S.L.T. 18 (expenses of appointment of new trustees).

[1] See s. 68 and *supra*, para. 677.

[2] *Christie* v. *Caledonian Rly. Co.*, 1894, 1 S.L.T. 582; *Crawfurd* v. *Caledonian Rly. Co.*, 1904, 12 S.L.T. 292; *Gunn* v. *Dollar Parochial Board*, 1886, 23 S.L.R. 623; cf. *Stevenson's Trs.*, 1878, 15 S.L.R. 471.

[3] *Forbes* v. *Caledonian Rly. Co.*, 1886, 24 S.L.R. 212.

[4] See Deas, Law of Railways, 401.

[5] Deas, Law of Railways, 406.

[6] *Duke of Hamilton*, 1858, 21 D. 124; *Marquis of Huntly* v. *Aboyne and Braemar Rly. Co.*, 1868, 6 M. 959; *Macdowall*, 1916, 2 S.L.T. 170, and cases under note 9 on previous page, *sub nom.* Expenses Refused.

[7] *Moncreiffe*, 1859, 21 D. 1359; *Chaplin*, 1926, S.L.T. 422; except under s. 71. See *supra*, para. 679.

[8] *Grant* v. *Edinburgh, Perth, and Dundee Rly. Co.*, 1851, 13 D. 1015; *Lord Elibank*, 1857, Duncan's Entail Pro., 141; *Logan*, 1889, 26 S.L.R. 521. See also *Stewart*, 1875, 12 S.L.R. 303.

[9] See *supra*, note 2.

expede a notarial instrument containing the particulars described in the section which shall vest the lands absolutely in the promoters as against all persons whose interests in the lands have been assessed and shall entitle the promoters as against such persons to immediate possession;[1] and such instrument being registered in the Register of Sasines, shall have the same effect as a conveyance so registered in terms of the Act. Similar provision is made by s. 76 for the case where compensation money is deposited in respect of refusal to accept the same, or neglect or failure to make out a title, or refusal or inability to convey the lands, or to discharge an incumbrance thereon, or absence from the country, or failure to appear at the inquiry before a jury.[2]

685. Feus and conveyances may be in the forms provided in the Schedules to the Act.[3] They must be registered within sixty days of the last date of execution, if the promoters wish to obtain a proper statutory title, with such advantages as that may confer.[4] Failure to register within the statutory period will relegate the promoters to their common law rights under a common law conveyance.[4] The right to take a common law conveyance is preserved by the terms of the proviso to the section.[5] The weight of authority seems to favour the view that the statutory conveyance, duly registered, creates a statutory tenure and extinguishes the relationship of superior and vassal.[6] But the view of two of the judges in the House of Lords in the *Heriot's Trust* case would seem to be that the point is immaterial, as in their view under ss. 107 to 111 and 126 the superior receives statutory rights which are equivalent to his feudal rights at common law.[7] Lands required for extraordinary purposes are not acquired by the statutory title, but under a common law conveyance.[8]

686. The expenses of all conveyances must be borne by the promoters, and include expenses of establishing and investigating the title.[9] But the expense of making up a complete feudal title in the person conveying is not chargeable against the promoters.[10] It is sufficient that the proprietor is prepared to grant a conveyance upon which the promoters can complete a title in their own name.[11] The stamp duty on the conveyance, which is payable by the promoters, is computed on the whole sum awarded as compensation to the owners, excluding damages awarded in respect of other lands, although that sum may include an item represented as compensation for loss of business carried on in the premises taken.[1] The War Department has in Ireland been held liable to pay the death duties as well as the cost of taking out representation.[2] In case of disagreement the expenses are ascertained and decerned for by the Lord Ordinary on summary petition. If, on taxation, one-sixth part is disallowed, the expenses of the taxation and application must be borne by the party whose expenses are so taxed.[3] In a matter of mere taxation the decision of the Lord Ordinary is probably not subject to review, but it is otherwise, if the Lord Ordinary has allowed expenses not authorised by the statute.[4]

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[1] See s. 89. [2] See *supra*, para. 681. [3] Sec. 80, Scheds. A and B.

[4] *Heriot's Trust* v. *Caledonian Rly. Co.*, 1915 S.C. (H.L.) 52; *Campbell* v. *Northern District Committee of County Council of Ayr*, 1904, 11 S.L.T. 587.

[5] Sec. 80. See *North British Rly. Co.* v. *Mags. of Edinburgh*, 1893, 20 R. 725, as to clause of warrandice.

[6] *Macfarlane* v. *Monklands Rly. Co.*, 1864, 2 M. 519 at 529; *Mags. of Elgin* v. *Highland Rly. Co.*, 1884, 11 R. 950; *Mags. of Inverness* v. *Highland Rly. Co.*, 1893, 20 R. 551; *Mags. of Inverness* v. *Highland Rly. Co.*, 1909 S.C. 943; *Fraser* v. *Caledonian Rly. Co.*, 1911 S.C. 145; *Heriot's Trust* v. *Caledonian Rly. Co.*, *cit. supra*, but see Lord Dunedin's speech in the last case. [7] Per Lords Dunedin and Parmoor; *contra* Lords Haldane and Atkinson.

[8] *M'Corkindale* v. *Caledonian Rly. Co.*, 1893, 1 S.L.T. 239; *Campbell* v. *Northern District Committee of County Council of Ayr*, *supra*.

[9] Sec. 81. [10] *Graham* v. *Caledonian Rly. Co.*, 1848, 10 D. 495.

[11] *Miles* v. *North British Rly. Co.*, 1867, 5 M. 402; *Thomson* v. *North British Rly. Co.*, 1867, 5 M. 410.

SECTION 12.—ENTRY ON LANDS.

SUBSECTION (1).—*Conditions of Entry.*

687. The promoters are entitled to enter upon the lands proposed to be acquired only in the following circumstances and subject to the following conditions:—

(i) By consent of the owners and occupiers;[5] or

(ii) Upon payment of the compensation agreed or awarded, or deposit thereof in bank in terms of the statute;[5] or

(iii) For the purpose of surveying and taking levels or boring or setting out the line of works only, upon giving not less than three nor more than fourteen days' notice to the owners and occupiers of the lands, without previous consent;[5] or

(iv) Before compensation is agreed or awarded, upon deposit in bank of the sum claimed or, in the case of parties who cannot be found, fixed by the valuator appointed by the sheriff[6] under the Act, accompanied, if required, by a bond, with two sufficient securities for payment of the compensation ultimately found due, with interest at the rate of 5 per centum from the date of entry until payment.[7]

The provisions regulating entry do not apply to the execution of operations on adjacent lands which injuriously affect, but do not impinge on, the lands of the complainer.[8] A special code for the taking of temporary possession of lands near a railway during the construction thereof is contained in the Railways Clauses Act.[9]

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[1] *Commrs. of Inland Revenue* v. *Glasgow and South-Western Rly. Co.*, 1887, 14 R. (H.L.) 33.

[2] *In re Bear Island Defence Works*, [1903] I.R. 1 Ch. 164; doubted, *In re Thames Tunnel, etc. Act*, [1908] 1 Ch. 493.

[3] Sec. 82.

[4] *Graham* v. *Caledonian Rly. Co.*, *supra*, at p. 499.

[5] Sec. 83.

[6] The Minister of Transport in the case of railways, 30 & 31 Vict. c. 126, s. 36; 9 & 10 Geo. V. c. 50, s. 2.

[7] Sec. 84.

[8] *Hutton* v. *London and South-Western Rly. Co.*, 1849, 7 Hare 259.

[9] 8 & 9 Vict. c. 33, ss. 25-37; *Wedderburn* v. *North British Rly. Co.*, 1871, 9 M. 896; *Carslaw* v. *M'Alpine & Sons*, 1899, 2 F. 239; and see *sub nom.* RAILWAYS.

Subsection (2).—*Entry of Consent.*

688. The consent required by the statute is that of owners and occupiers only, and the section has been so applied in Ireland.[1] Consent may be implied, but the entry is limited to lands included within the notice to treat.[2] Consent once given cannot be recalled.[3] Nor can the notice of entry be withdrawn by the promoters.[4]

Subsection (3).—*Entry on Payment, etc.*

689. The payment required is not merely to the owner or occupier but to all persons interested in the lands.[5] If in spite of payment or deposit possession is refused, it does not follow that the promoters may force an entry at their own hand.[6] Warrant for obtaining possession may be obtained on application to the sheriff under s. 89. It would appear also, at least where deposit is made, that the promoters are not entitled to possession until they have made up a title by notarial instrument under s. 76.[7] Failure by the promoters to provide accommodation works is not a sufficient ground for preventing them entering into possession.[8]

Subsection (4).—*Entry for Purposes of Survey, etc.*

690. Possession under this head is purely temporary and the conditions of notice must be complied with.[9] An interdict against the company taking possession of the lands will not be obtained upon facts which amount to no more than a temporary entry, or a deposit of materials by contractors on the lands with consent of the tenant.[10] The entry which is authorised by the statute is only to such lands as are covered by a notice to treat[11] or equivalent contract. Compensation must be made for any damage occasioned to the owners or occupiers by the operations of the promoters.[12]

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[1] Sec. 83; *Bell* v. *Belfast Corpn.*, [1914] 2 I.R. 1.

[2] *Renton* v. *North British Rly. Co.*, 1845, 8 D. 247; *Wood* v. *Charing Cross Rly. Co.*, 1863, 33 Beav. 290; *Pell* v. *Northampton, etc. Rly. Co.*, 1866, 36 L.J. Ch. 319.

[3] *Knapp* v. *London, Chatham and Dover Rly. Co.*, 1863, 32 L.J. Ex. 236, at p. 239.

[4] *Clark* v. *City of Glasgow Union Rly. Co.*, 1868, 6 S.L.R. 185.

[5] *Inge* v. *Birmingham, etc. Rly. Co.*, 1853, 3 De G. M. & G. 658; *Perks* v. *Wycombe Rly. Co.*, 1862, 3 Giff. 662; *Carter* v. *Great Eastern Rly. Co.*, 1863, 9 Jur. (N.S.) 618.

[6] *Alexander* v. *Bridge of Allan Water Co.*, 1868, 6 M. 324, at p. 327; cf. *Loosemore* v. *Tiverton, etc. Rly. Co.*, 1882, 22 Ch. D. at p. 41.

[7] *Bridge of Allan Water Co.* v. *Alexander*, 1868, 6 M. 321; *Alexander* v. *Bridge of Allan Water Co.*, 1868, 6 M. 324.

[8] *Black* v. *Formartine, etc. Rly. Co.*, 1861, 23 D. 600.

[9] *Fooks* v. *Wilts, etc. Rly. Co.*, 1846, 5 Hare 199; *Fleming* v. *Caledonian Rly. Co.*, 1847, 9 D. 792.

[10] *Standish* v. *Mayor of Liverpool*, 1852, 1 Drew. 1; *Fleming* v. *Caledonian Rly. Co.*, *cit. supra*.

[11] *Dalgleish* v. *Stirling, etc. Rly. Co.*, 1847, 9 D. 505.

[12] Sec. 83.

SUBSECTION (5).—*Entry before Compensation fixed.*

691. Possession under s. 84 is lawful so long as the notice to treat is given or agreement come to within the statutory period for the exercise of compulsory powers, and entry made within the statutory period for completion of the works.[1] The possession under this section is permanent, not temporary, even though the promoters may be unable to complete their works within the statutory period,[1] and the works may be completed after the expiry of the statutory period.[2] The section is applicable, *inter alia*, "before an agreement shall have been come to . . . for the purchase-money or compensation," and accordingly is not confined to cases where notice to treat has been given, but would apply where an agreement has been made to purchase certain defined lands,[3] but the price has not been fixed.[4] The deposit should cover the value of the whole lands included in the agreement, or notice to treat;[5] and also the value of the whole buildings contained in a counter notice under s. 90,[6] unless the promoters are prepared to run the chance of the counter-notice being bad.[7] It does not include the value of minerals where these are not acquired under the notice to treat.[8] The money deposited is subject to the control of the Court of Session, to whom all applications for its disposal must be made.[9]

692. In addition to deposit, a bond must be executed in terms of the statute.[10] Two sureties for fulfilment of the conditions of the bond are also essential.[11] The bond must be under the hand of the secretary or other properly authorised officer in the case of a company or corporation and in other cases under the hand of two or more of the promoters. On satisfaction of the conditions in the bond the promoters are entitled to uplift the deposit.[12] No one except the bondholder is entitled to object to the promoters obtaining repayment of the deposit.[13] The deposit is not security for expenses incurred by the proprietor.[14] But, in respect of failure to observe the conditions of the bond for which the deposit is security, the deposit may be applied in *pro tanto* discharge of the proprietor's claims under the bond.[15] And interest from the date of entry being also due under the bond,[1] this also may be claimed out of the deposit, even although no bond has in fact been granted.[2] The promoters are not entitled to resist a petition to uplift the consigned sum in payment of compensation awarded, on the ground that they are raising a reduction of the decree-arbitral, but if the reduction be first raised, the petition will not be granted till it is decided.[3]

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[1] *Tiverton, etc. Rly. Co.* v. *Loosemore*, 1884, 9 App. Cas. 480.

[2] *Midland Rly. Co.* v. *Great Western Rly. Co.*, [1909] A.C. 445. See also *Western District Committee of County Council of Stirling* v. *North British Rly. Co.*, 1896, 23 R. 929, and *Dennistoun's Trs.* v. *Caledonian Rly. Co.*, 1900, 7 S.L.T. 464, under Railways Clauses Act, s. 16.

[3] *E.g.* under ss. 6, 7, and 9.

[4] *Tiverton, etc. Rly. Co.* v. *Loosemore*, *ubi cit.* at pp. 502, 503.

[5] *Barker* v. *North Staffordshire Rly. Co.*, 1848, 5 Rail. C. 401.

[6] *Giles* v. *London, Chatham & Dover Rly. Co.*, 1861, 30 L.J. Ch. 603.

[7] *Loosemore* v. *Tiverton, etc. Rly. Co.*, 1882, 22 Ch. D. at p. 40.

[8] *Ex parte Neath, etc. Rly. Co.*, 1876, 2 Ch. D. 201.

[9] Secs. 85, 86; *Edinburgh, etc. Rly. Co.*, 1850, 22 Sc. Jur. 573.

[10] Sec. 84.

[11] Sec. 84; *Radcliffe* v. *Glasgow, etc. Rly. Co.*, 1847, 9 D. 1462. See 30 & 31 Vict. c. 126, s. 36; 9 & 10 Geo. V. c. 50, s. 2, in case of railways.

[12] Sec. 86; *Ex parte Midland Rly. Co.*, [1904] 1 Ch. 61; *Ex parte Neath, etc. Rly. Co.*, *supra*.

[13] *Ex parte Midland Rly. Co.*, *ubi cit.*

[14] *Edinburgh, etc. Rly. Co.* v. *Hope*, 1854, 16 D. 1041.

[15] Sec. 86; *In re Mutlow's Estate*, 1878, 10 Ch. D. 131.

Subsection (6).—*Penalties for Unlawful Entry.*

693. If the promoters or their contractors wilfully enter on the lands without having made payment or deposit, the promoters are liable to the person in possession in a penalty of £10 per day over and above the payment of all damage suffered. The penalty and damage are recovered before the sheriff.[4] Tenants for a year or shorter time, as well as owners or tenants on long leases are entitled to proceed under this section.[5] If after conviction the company or their contractors remain in possession, the company incur a further liability of £25 per day, which may be recovered by the occupier of the lands in any competent Court. No penalty attaches where the company have *bona fide* made payment or deposit of compensation in favour of the wrong party.[4] The section has been liberally construed in England in favour of promoters, so as to exempt them from penalties where there has been substantial compliance with the statute, though there may have been irregularities in the manner of taking possession.[6] The sheriff's decision as to penalty is not conclusive as to the right of entry.[7]

Subsection (7).—*Warrant to take Possession.*

694. If, where the promoters are duly authorised to enter, the party in possession refuses to give up possession or hinders the promoters from entering, they may apply by petition to the sheriff for possession, and the expenses of the procedure fall to be paid by the party wrongfully refusing to cede possession, and may be deducted from the compensation or, if no compensation is payable, recovered by poinding and sale.[8] If no opposition is made to entry, application to the sheriff is probably unnecessary.[9]

Section 13.—Intersected Lands.

695. The statute contains two clauses, one in favour of the owner and the other in favour of the promoters, having reference to small portions of land severed by the promoters' works. If lands, not being situate in a town or built upon, are so cut through by the works as to leave, either on both sides or one side, a less quantity than half a statute acre, and if the owner require the promoters to purchase such small portions, they must do so unless the owner have other land adjoining into which the same can be thrown. In that event, the promoters must, if so required by the owner and at their own expense, throw the piece of land so left into the adjoining land by removing the fences and levelling and soiling the ground in a sufficient and workmanlike manner.[1] This section only applies to lands "not being situate in a town or built upon." "Town" must be interpreted in a popular sense as referring to a place where there is "a continuous occupancy of the ground by houses," and not in a legal sense as being within a municipal boundary.[2]

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[1] Sec. 84; *Rhys* v. *Dare Valley Rly. Co.*, 1874, L.R. 19 Eq. 93.

[2] *West Highland Rly. Co.* v. *Place*, 1894, 21 R. 576.

[3] *Fortune* v. *Edinburgh, etc. Rly. Co.*, 1849, 11 D. 531; *Main* v. *Lanarkshire, etc. Rly. Co.*, 1895, 22 R. 487.

[4] Sec. 87.

[5] *Glasgow District Subway Co.* v. *Johnstone*, 1892, 20 R. (J.) 28.

[6] See *Steele* v. *Midland Rly. Co.*, 1869, 21 L.T. (N.S.) 387; *Hutchinson* v. *Manchester, etc. Rly. Co.*, 1846, 15 M. & W. 314.

[7] Sec. 88.

[8] Sec. 89.

[9] *Loosemore* v. *Tiverton, etc. Rly. Co.*, 1882, 22 Ch.D. at p. 41; cf. *Alexander* v. *Bridge of Allan Water Co.*, 1868, 6 M. 324, at p. 327.

696. If land shall be so severed as to leave on either side pieces of less than half a statute acre or of less value than the expense of making a bridge, culvert, or other communication which the promoters may be compelled to make, and if the owner has no other adjoining lands and requires the promoters to make such communication, the promoters may require the owner to sell the severed land; and any dispute as to the value of the land or the cost of making communication may be settled as in cases of disputed compensation.[3] The right of the promoters under this section is not restricted to lands not situate in a town or built upon, but applies to all severed land;[4] but where the small portion of land is valuable as enabling the owner to enjoy rights of fishing, bathing, etc., the provisions are not applicable, and he may be entitled to accommodation works under other statutes.[5]

SECTION 14.—APPORTIONMENT BETWEEN LANDLORD AND TENANT.

697. If part of lands held under lease is taken, the rent payable under the lease is apportioned between the lands taken and the lands not taken, either by agreement between the lessor and lessee on the one hand and the promoters on the other hand or, failing agreement, by the sheriff. Thereafter the lessee is only liable for the rent apportioned to the part not taken, and all the conditions of the lease become applicable to that part.[6] As between the promoters and the lessee the consent of the lessor to the apportionment is not required.[7] If the lessor will not consent, the duty of the promoters is to obtain an apportionment against him from the sheriff.[7] An apportionment between lessee and promoters cannot, however, affect the landlord's rights against his tenant.[8]

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[1] Sec. 91.

[2] *Falkner* v. *Somerset, etc. Rly. Co.*, 1873, L.R. 16 Eq. at p. 459. See further, *infra*, para. 703.

[3] Sec. 92.

[4] *Eastern Counties Rly. Co.* v. *Marriage*, 1860, 9 H.L.C. 32.

[5] *Falls* v. *Belfast, etc. Rly. Co.*, 1849, 12 Ir. L.R. 223.

[6] Sec. 112. *Hunter* v. *North British Rly. Co.*, 1849, 12 D. 37.

[7] *Slipper* v. *Tottenham, etc. Rly. Co.*, 1867, L.R. 4 Eq. 112.

[8] *Wainwright* v. *Ramsden*, 1839, 5 M. & W. 602.

698. In the case of tenants for a year or from year to year no apportionment is made,[1] and under this description are included persons who hold under leases, of which less than a year remains to run.[2] In such a case the tenant receives compensation for the value of his unexpired term,[1] and remains liable to the landlord for the rent applicable to the unexpired portion of his lease.[3] The nature of the tenant's interest falls to be determined as at the date of the promoters' notice to treat—at least, if followed up promptly.[4] Irrespective of apportionment of rent, tenants are entitled to be compensated for their interest in the lands taken.[5] This matter is dealt with elsewhere.[6]

SECTION 15.—INTERESTS OMITTED TO BE PURCHASED.

699. If, after the promoters have entered on the lands, it appears that there is any right or interest which, through mistake or inadvertency, has not been purchased or compensated, then, irrespective of whether the period for purchase has expired or not, the promoters shall remain in possession, provided that within six months after notice of the right, or within six months after its being established by law [7] if the right is disputed, they purchase or make compensation for the same, and for the intervening profits or interest, such compensation being agreed on or awarded as if the promoters had purchased before entry.[8] The value is to be assessed as at the date of entry; [9] and if the promoters unsuccessfully dispute the right, they must pay the whole expenses of the litigation necessary to establish it.[10] This includes expenses as between agent and client.[11] But there may be a question as to what expenses fall under the statute.[12] The omission must have been by mistake or inadvertency, and the promoters cannot avail themselves of these sections where they did not, prior to the expiry of the period allowed for compulsory purchase, intend to acquire the omitted estate or interest.[13]

SECTION 16.—SUPERFLUOUS LANDS.

700. The promoters are not entitled to hold lands except for the proper purposes of their undertaking, and provision is made for the disposal of lands which have been acquired, but are ultimately found not to be necessary.[1] The restriction against holding land applies, however, only to lands which the promoters are authorised to acquire compulsorily, not to lands acquired for extraordinary purposes.[2] These lands acquired for extraordinary purposes may be sold by the promoters as ordinary proprietors.[3] Other lands acquired for the purposes of the undertaking can be sold only under the conditions of the statute.[4] But a title to such lands may be acquired by prescription.[5]

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[1] Sec. 114.

[2] *R.* v. *Great Northern Rly. Co.*, 1876, 2 Q.B.D. 151; see *Ferguson* v. *Hood, cit. infra.*

[3] *Ferguson* v. *Hood*, 1881, 9 R. 168.

[4] *City of Glasgow Union Rly. Co.* v. *M'Ewen & Co.*, 1870, 8 M. 747; cf. *R.* v. *Kennedy*, [1893] 1 Q.B. 533.

[5] Secs. 113–115.

[6] *Supra*, para. 642 *et seq.*

[7] See *Caledonian Rly. Co.* v. *Davidson*, [1903] A.C. 22.

[8] Sec. 117.

[9] Sec. 118.

[10] Sec. 119.

[11] *Young* v. *North British Rly. Co.*, 1888, 15 R. (H.L.) 32.

[12] *Caledonian Rly. Co.* v. *Davidson*, [1903] A.C. at p. 35.

[13] *Davidson's Trs.* v. *Caledonian Rly. Co.*, 1894, 21 R. 1060; *Martin* v. *London, Chatham & Dover Rly. Co.*, 1866, L.R. 1 Ch. 501; *Stretton* v. *Great Western Rly. Co.*, 1870, L.R. 5 Ch. 751.

701. Within a period prescribed by the special Act, or if none be prescribed, within ten years after the time limited for the completion of the works, the promoters must sell absolutely[6] all superfluous lands in the manner they deem most advantageous, and in default of such sale all such lands remaining unsold at the expiration of such period thereupon vest in and become the property of the adjoining owners in proportion to the extent of their lands respectively adjoining the same.[7] It is sufficient to prevent such vesting that an agreement to sell shall have been made within the prescribed period.[8] Until the ten years or other prescribed period has run, the promoters are the sole judges of what land is or is not required;[9] and unless they have clearly treated it as superfluous, as by attempting to transfer it to a third party, the adjoining owner has no title to exercise his pre-emptive rights.[10] The fact that the prescribed period has expired without the lands being used by the promoters, or the fact that on the expiry of the period they are actually in the occupation of the adjacent proprietor, or let out by the promoters to tenants for agricultural or other purposes, is not in itself decisive if in reasonable probability they are likely to be required for the purposes of the undertaking within a reasonable time.[11] The question is primarily a question of fact to be determined on the circumstances as existing at the expiry of the prescribed period, including the prospect of development of the undertaking and of the locality.[12] If taken for future doubling of a railway line, it would seem the land could not be regarded as superfluous.[13] But land separated from the promoters works by intervening ground which the promoters had no power to acquire without obtaining fresh powers, and which prevented the promoters using the land thus isolated, was held without difficulty to be superfluous land; [1] and likewise lands which the promoters had clearly treated as superfluous, either by attempt to sell or by physical treatment.[2] Compulsory purchase by one company of part of the lands of another company does not warrant the inference that lands so acquired were superfluous.[3] Land which may become superfluous must be land separated by a vertical and not by a horizontal boundary from land required for the purposes of the promoters.[4] The time for the sale of superfluous lands may, in the case of railways, be extended by a certificate of the Minister of Transport under the Railway Companies Act, 1864,[5] but not so as to defeat a right already vested to such lands.[6] Where a railway is authorised to be abandoned under the statutes to that effect the whole lands of the Company fall to be dealt with as superfluous lands.[7] Apart from this case the abandonment of an undertaking would not seem to constitute the lands of the undertaking superfluous lands.[8] A derelict line of railway, it has been held, does not fall to be treated as superfluous land.[9]

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[1] Secs. 120–125; *Great Western Rly. Co.* v. *May*, 1874, L.R. 7 H.L. 283.

[2] *City of Glasgow Union Rly. Co.*, v. *Caledonian Rly. Co.*, 1871, 9 M. (H.L.) 115.

[3] Sec. 13.

[4] *Mulliner* v. *Midland Rly. Co.*, 1879, 11 Ch. D. 611; unless otherwise provided by the special Act, *North British Rly. Co.* v. *Birrell's Trs.*, 1918 S.C. (H.L.) 33.

[5] *Midland Rly. Co.* v. *Wright*, [1901] 1 Ch. 738, and cases there cited; *Brown* v. *North British Rly. Co.*, 1906, 8 F. 534.

[6] See *London and South-Western Rly. Co.* v. *Gomm*, 1882, 20 Ch. D. 562; *Ray* v. *Walker*, [1892] 2 Q.B. 88; *In re Higgins and Hitchman*, 1882, 21 Ch. D. 95.

[7] Sec. 120.

[8] *Caledonian Rly. Co.* v. *City of Glasgow Union Rly. Co.*, 1869, 7 M. 959.

[9] *Glover's Trs.* v. *City of Glasgow Union Rly. Co.*, 1869, 7 M. 338.

[10] *Astley* v. *Manchester, etc. Rly. Co.*, 1858, 27 L.J. Ch. 478; *London and South-Western Rly. Co.* v. *Blackmore*, 1874, L.R. 4 H.L. 610.

[11] *Hooper* v. *Bourne*, 1880, 5 App. Cas. 1; *North British Rly. Co.* v. *Moon's Trs.*, 1879, 6 R. 640; *Betts* v. *Great Eastern Rly. Co.*, 1878, 3 Ex. D. 182; affd. by H.L. 49 L.J. Ex. 197; *Macfie* v. *Callander and Oban Rly. Co.*, 1898, 25 R. (H.L.) 19; 1897, 24 R. 1156.

[12] *Macfie* v. *Callander and Oban Rly. Co.*, *ubi cit.*

[13] *Brown* v. *North British Rly. Co.*, 1906, 8 F. 534.

702. When vesting takes place, the various owners share in proportion to frontage; [10] vesting takes place by force of statute.[11]

703. Before the promoters dispose of superfluous lands, they must, unless the lands be situate within a town,[12] or be lands built upon,[13] or used for building purposes,[14] first offer to sell the same to the person then owning the lands from which the superfluous lands were originally severed, or if he refuse or cannot be found, to the several persons whose lands immediately adjoin the lands to be sold, and where more than one person is entitled to such right of pre-emption, to such persons in succession in such order as the promoters think fit.[15] "Adjoining land" includes any land which comes substantially in contact with the superfluous land.[16] The right of pre-emption is lost if not exercised within six weeks, and a declaration in writing to that effect made by a party not interested before the sheriff is sufficient evidence of the fact.[1] The pre-emptive right may also be abrogated by the terms of the special Act.[2] Differences as to price are settled by arbitration, and the expenses of the reference are in the discretion of the arbiter.[3] Upon tender of the price agreed or awarded, the promoters are bound to convey.[4] The arbitration here referred to is not arbitration under the statute.[5]

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[1] *Stewart* v. *Highland Rly. Co.*, 1889, 16 R. 580.

[2] *London and South-Western Rly. Co.* v. *Blackmore*, 1874, L.R. 4 H.L. 610; *Norton* v. *London and North-Western Rly. Co.*, 1879, L.R. 13 Ch. D. 268; cf. *Hobbs* v. *Midland Rly. Co.*, 1882, 20 Ch. D. 418.

[3] *Dunhill* v. *North-Eastern Rly. Co.*, [1896] 1 Ch. 121.

[4] *In re Metropolitan District Rly. Co. and Cosh*, 1880, 13 Ch. D. 607; *Mulliner* v. *Midland Rly. Co.*, 1879, 11 Ch. D. 611; *Hooper* v. *Bourne*, 1880, 5 App. Cas. 1; cf. *Glasgow City and District Rly. Co.* v. *MacBrayne*, 1883, 10 R. 894.

[5] 27 & 28 Vict. c. 120, ss. 3 and 9.

[6] *Moody* v. *Corbett*, 1866, L.R. 1 Q.B. 510; *Great Western Rly. Co.* v. *May*, 1874, L.R. 7 H.L. 283.

[7] 13 & 14 Vict. c. 83, s. 27.

[8] *Smith* v. *Smith*, 1868, L.R. 3 Ex. 282.

[9] *In re Duffy's Estate*, [1897] 1 I.R. 307; doubted, Cripps, p. 305.

[10] See *Moody* v. *Corbett*, *supra*; *Smith* v. *Smith*, *supra*.

[11] *Great Western Rly. Co.* v. *May*, *supra*.

[12] See *supra*, para. 695.

[13] *Carington* v. *Wycombe Rly. Co.*, 1866, L.R. 2 Eq. 825.

[14] *London and South-Western Rly. Co.* v. *Blackmore*, *supra*; *Coventry* v. *London, Brighton, and South Coast Rly. Co.*, 1867, L.R. 5 Eq. 104.

[15] Sec. 121.

[16] *London and South-Western Rly. Co.* v. *Blackmore*, *ubi cit.*; *Coventry* v. *London, Brighton, and South Coast Rly. Co.*, *ubi cit.*

704. In all conveyances by the promoters the word "dispone" operates as a clause of absolute warrandice, except where otherwise provided by express words.[6]

SECTION 17.—ASSESSMENTS ON UNDERTAKING.

705. If the promoters become possessed of any lands subject to land tax, or poor rate, or prison assessment, they must, from time to time, until the works are completed and assessed, make good the deficiency caused in such tax and rates by reason of the lands having been taken, but they may redeem the land tax.[7] This provision does not apply in the case of a voluntary purchase.[8] In determining whether such deficiency exists, the promoters' property within the parish is to be considered as a whole.[9] Where additional lands are acquired subsequently to the completion of the promoters' works these fall to be dealt with in the same way "until the land by complete conversion has become part of the undertaking," and they cannot be slumped with the existing undertaking so as to conceal the deficiency that exists before completion of operations thereon.[10]

SECTION 18.—PROCEEDINGS UNDER THE ACT.

706. The Lands Clauses Act makes provision for the service of notices on the promoters;[11] for the tender of amends in respect of any irregularity or unlawful proceeding;[12] for the recovery and application of penalties;[13] limits review of proceedings under the Act;[14] and provides for access to the special Act.[15]

707. These provisions correspond to similar provisions in the Companies Clauses Act.[16] They do not limit the jurisdiction of any competent Court in respect of proceedings which are *ultra vires.*[1] But the *ultra vires* nature of the Act must be clear.[2]

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[1] Sec. 122.

[2] *North British Rly. Co.* v. *Birrell's Trs.*, 1918 S.C. (H.L.) 33.

[3] Sec. 123.

[4] Sec. 124.

[5] *Carington* v. *Wycombe Rly. Co.*, 1868, L.R. 3 Ch. at p. 385.

[6] Sec. 125.

[7] Sec. 127.

[8] *Barony Parish Council* v. *Glasgow School Board*, 1895, 23 R. 221.

[9] *Hall* v. *City of Glasgow Union Rly. Co.*, 1881, 8 R. 687.

[10] *Hall* v. *North British Rly. Co.*, 1883, 10 R. 857.

[11] Sec. 128.

[12] Sec. 129.

[13] Secs. 130 to 135; *Glasgow City and District Rly. Co.* v. *Hutchison's Trs.*, 1884, 11 R. (J.) 43; *Glasgow City and District Rly. Co.* v. *Meldrum's Trs.*, 1884, 11 R. (J.) 59.

[14] Secs. 138, 139; *Bridge of Allan Water Co.* v. *Alexander*, 1868, 6 M. 321.

[15] Secs. 142, 143.

[16] See *sub nom.* PUBLIC COMPANY.

SECTION 19.—ACCOMMODATION WORKS, ETC.

708. In the case of certain undertakings, and particularly in the case of railways, substitute roadways and bridges and accommodation works may have to be provided by the undertakers. These, while incidental to the powers of compulsory purchase conferred by statute, are peculiar to the undertakings concerned and are dealt with elsewhere.[3]

PART III.—ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT, 1919.[4]

SECTION 1.—GENERAL.

709. This Act was passed on 19th August 1919, and came into operation on 1st September 1919.[5] It effects important changes, in the cases to which it relates, upon the code in operation under the Lands Clauses Acts, particularly in the matter of the mode and basis of assessment of compensation for the compulsory acquisition of land. The Act applies only to cases where by or under any statute (whether passed before or after the passing of the Act) land is authorised to be acquired compulsorily by any Government Department or any local or public authority.[6] "Government Department" or "local authority" requires no definition. "Public authority" is defined as "any body of persons, not trading for profit, authorised by or under any Act to carry on a railway, canal, dock, water, or other public undertaking."[7] A water board does not trade for profit merely because in the exercise of its statutory duties it requires to raise revenue to meet interest and sinking fund charges upon its statutory borrowing.[8] The Central Electricity Board is deemed to be a public authority for the purposes of this Act.[9] In spite of the wide phraseology of the Act,[10] it must be taken not to apply to the acquisition of land by a local authority where the terms upon which such acquisition is to be followed out are made matter of special provision in the special Act.[11] The provisions of the Defence of the Realm Acts so far as inconsistent with the rules for assessment of compensation contained in the Act are expressly saved.[12] "Land" under the Act includes water and any interests in land or water and any servitude or right in, to, or over land or water.[1] The Act does not apply to the acquisition of a statutory undertaking.[2]

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[1] *Caledonian Rly. Co.* v. *Fleming*, 1869, 7 M. 554; *Glasgow Subway Co.* v. *Provan*, 1893, 1 S.L.T. 60.

[2] *Dunbarton Water Comrs.* v. *Lord Blantyre*, 1884, 12 R. 115; *Glasgow, Yoker, etc. Rly. Co.* v. *Lidgerwood*, 1895, 23 R. 195.

[3] See under RAILWAYS, WATER, etc.

[4] 9 & 10 Geo. V. c. 57; amended by 9 & 10 Geo. V. c. 97, s. 32, Sched. IV., and 15 Geo. V. c. 15, s. 120, Sched. VI.

[5] 9 & 10 Geo. V. c. 57, s. 12 (1).

[6] *Ibid.*, s. 1 (1).

[7] *Ibid.*, s. 12 (2).

[8] *Metropolitan Water Board* v. *Berton*, [1921] 1 Ch. 299.

[9] 16 & 17 Geo. V. c. 51, s. 21.

[10] See ss. 1, 7 (1).

[11] *Corpn. of Blackpool* v. *Starr Estate Co.*, [1922] 1 A.C. 27.

[12] Sec. 7 (1).

710. Where the Act applies, any question of disputed compensation and, where any part of the land to be acquired is subject to a lease which comprises land not acquired, any question as to the apportionment of the rent payable under the lease, fall to be determined by an official arbiter appointed in terms of the Act.[3] These are the only two questions which are committed to the jurisdiction of the arbiter under the Act. The first is not confined to compensation to the owner whose land is being acquired but would seem to extend to all interests entitled to be compensated under the Lands Clauses Acts, including persons injuriously affected, bondholders, rent-charge holders, superiors, and others.[4] Where a sewer is laid through land and vests in the local authority it has been held that the compensation falls to be assessed under this Act,[5] but this would seem to follow in any event from the definition of "land" in the Act.[6] Whether the Act covers compensation for minerals under the Railways and Waterworks Clauses Acts is more doubtful, as the compensation there payable does not arise out of the acquisition of land, but out of the purchase of support.[7] The second question is confined to apportionment of rent under a lease, which under the Lands Clauses Acts was matter for the sheriff.[8] The apportionment of rent-charges where part only of the land is taken is still left with the sheriff.[9]

SECTION 2.—ASSESSMENT OF COMPENSATION.

711. The rules for assessing compensation are as follows[10]:—

1. No allowance shall be made on account of the acquisition being compulsory.
2. The value of land shall, subject as after provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise: Provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant.
3. The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or any local or public authority: Provided that any *bona fide* offer for the purchase of the land made before the

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[1] Sec. 12 (2), 11 (1) (*b*).

[2] Sec. 10.

[3] Sec. 1.

[4] *Cf.* ss. 3, 4.

[5] *Thurrock, etc. Sewerage Board* v. *Thames Land Co.*, 1925, 23 L.G.R. 648.

[6] Sec. 12 (2).

[7] See *supra*, para. 669.

[8] *Supra*, para. 697.

[9] See *supra*, para. 647.

[10] Sec. 2.

passing of the Act which may be brought to the notice of the arbitrator shall be taken into consideration:

The proviso to this subsection has been held to be of general application, not confined to cases of land having special suitability or adaptability for a particular purpose.[1] And the offer referred to may be an offer of the acquiring authority itself.[1] The first part of the rule would seem to be little more than declaratory of the cases decided on special suitability before the passing of the Act.[2]

4. Where the value of the land is increased by reason of the use thereof, or of any premises thereon, in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the inmates of the premises or to the public health, the amount of that increase shall not be taken into account.

5. Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land of that purpose, the compensation may, if the official arbitrator is satisfied that reinstatement in some other place is *bona fide* intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.

   Many institutions and undertakings are not readily susceptible of market value, in that they are not commonly bought and sold. Churches and schools provide ready illustrations. To such cases this rule will apply.

6. The provisions of Rule 2 shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

SECTION 3.—PROCEDURE BEFORE OFFICIAL ARBITER.

712. The official arbiter need make no declaration before taking up any reference.[3] He must sit in public.[4] Not more than one expert witness on either side can be heard unless the arbiter otherwise directs,[5] unless the compensation claimed covers compensation for minerals or disturbance of business, when one additional witness on the value of the minerals or on the damage by disturbance may be allowed.[5] Either party, however, is given a right to obtain an assessment of the value of the land from the Commissioners of Inland Revenue which he may lay before the arbiter.[6] The official arbiter may also enter on and inspect any land which is the subject of the proceedings before him.[7] For the purposes of s. 2 the official arbiter is entitled to such returns and assessments as he may require.[8] He must on the application of either party specify the amount awarded in respect of any particular matter the subject of his award.[1] The fees in respect of proceedings before him are prescribed by Treasury Regulations.[2] Rules of procedure may be made by the Reference Committee,[3] but no such rules have yet been made for Scotland. Where several interests may fall to be compensated in respect of the same land, the respective claims may be heard together, but the value of the several interests in the land having a market value shall be separately assessed.[4]

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[1] *Percival* v. *Peterborough Corpn.*, [1921] 1 K.B. 414.
[2] *Supra*, para. 655.
[3] Sec. 3 (2).
[4] Sec. 3 (5).
[5] Sec. 3 (1).
[6] Sec. 8 (4); *infra*, para. 719.
[7] Sec. 3 (4).
[8] Sec. 2.

SECTION 4.—COSTS AND NOTICE OF CLAIM.

713. Costs, subject to certain qualifications laid down in the statute, are in the discretion of the arbiter.[5] In this respect the corresponding provisions of the Lands Clauses Acts have been modified.[6] If the acquiring authority has made an unconditional offer in writing of any sum as compensation, and the sum awarded does not exceed the amount of the offer, the claimant pays costs as from the date of the offer, unless the arbiter for special reasons orders otherwise.[7] The claimant must give the acquiring authority notice in writing of the amount claimed, with sufficient particulars and in sufficient time to enable the acquiring authority to make a proper offer, and if he fails to do so the provisions of subsection (1) apply "as if an unconditional offer had been made by the acquiring authority at the time when in the opinion of the official arbitrator sufficient particulars should have been furnished and the claimant had been awarded a sum not exceeding the amount of such offer."[8] This would appear to mean that the claimant, on failure to furnish particulars timeously, must pay all costs as from the date when in the opinion of the arbiter such particulars should have been furnished to the acquiring authority. A belated notice of his claim will not save him from the penalty of costs even as from its date, for the policy of the Act is that the acquiring authority should have time to consider the claim and decide whether it will go on with the acquisition.[8] Six weeks is the period given by the Act for such consideration.[8] And it may be assumed that six weeks prior to the commencement of the arbitration will be the latest date at which the arbiter will hold that a sufficient statement of particulars should have been lodged.

714. The notice of claim must state (1) the exact nature of the interest in respect of which compensation is claimed; (2) details of the compensation claimed, distinguishing the amounts under separate heads; and must (3) show how the amount claimed under each head is calculated.[8] The notice of claim should be accompanied by an unconditional offer to accept the sum claimed as compensation.[9] When such notice has been delivered the acquiring authority may, within six weeks after delivery, withdraw any notice to treat which has been served on the claimant or any other person interested in the land, but shall be liable to pay compensation to any such claimant or other person for any loss or expense occasioned by the notice to treat having been given and withdrawn. Such compensation, in default of agreement, is determined by the official arbiter.[1]

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[1] Sec. 3 (3).

[2] Sec. 3 (6); see S.R. & O., 1920, No. 285; S.R. & O., 1920, No. 690; S.R. & O., 1921, No. 854, S. 47.

[3] Sec. 3 (7); 1 (5) for Reference Committee.

[4] Sec. 4.

[5] Sec. 5 (4); *Bradshaw* v. *Air Council*, [1926] Ch. 329.

[6] See *supra*, paras. 632, 636, 638.

[7] Sec. 5 (1).

[8] Sec. 5 (2).

[9] Sec. 5 (3).

715. If the arbiter awards a sum equal to or greater than the sum claimed and timeously notified the authority pays costs as from the date of the claimant's offer to accept such sum, unless for special reasons the arbiter decides otherwise.[2] The arbiter has a large discretion in the matter of costs, and may act as his own taxing master, or award a round sum to cover costs.[3] He may in any case disallow the cost of counsel.[4] The acquiring authority may deduct costs given against the claimant from any sum of compensation awarded him,[5] or, without prejudice to any other method of recovery, may recover the same, or any part not so deducted, "summarily as a civil debt."[6] This last method of recovery, however appropriate to England, is not readily recognisable as having place in Scotland, but presumably would take the form of a summary application under the Sheriff Courts Act.[7] Costs include any fees, charges, and expenses of the arbitration or award.[8]

SECTION 5.—REVIEW.

716. The official arbiter is final on fact, but he may, and shall, if the Court of Session directs, state at any stage of the proceedings, in the form of a special case for the opinion of the Court of Session, any question of law arising in the course of the proceedings.[9] He may also state his award, as to the whole or part thereof, in the form of a special case for the opinion of the Court.[9] The decision of the Court of Session on a case stated is final and not subject to review.[9]

SECTION 6.—EXCLUSION OF OFFICIAL ARBITER.

717. The parties may, if they agree, refer any question of disputed compensation or apportionment of rent to an arbiter agreed on between them or to the Commissioners of Inland Revenue.[10] Where an arbiter is selected by agreement, the provisions of the Act, except sections 1 and 4, and so much of section 3 as requires proceedings to be in public, and as provides for the fixing of fees, apply as if the arbiter was an official arbiter.[11]

718. The Commissioners of Inland Revenue do not proceed by arbitration, but cause an assessment to be made in accordance with the rules for the assessment of compensation laid down in the Act.[1] They are also given power to call for information, written or oral, and for the production of documents;[2] through their officers to enter on and inspect the land;[3] to hear parties by an officer of the valuation office;[4] to decline to proceed if either party refuses or neglects to comply with any direction or requirement of the Commissioners, and in that case to refer the matter to the official arbiter who, when awarding costs, shall take into consideration any report of the Commissioners as to the refusal or neglect which rendered the reference to him necessary.[5] The assessment of the Commissioners when made is published to the parties, and takes effect as if it were an award of the official arbiter.[6] In view of the powers thus specially given to the Commissioners it would appear that the provisions of the Act otherwise do not apply and accordingly that the Commissioners have no power to award costs or to state a case.

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[1] Sec. 5 (2).
[2] Sec. 5 (3).
[3] Sec. 5 (4), (5); *Bradshaw* v. *Air Council*, [1926] Ch. 329.
[4] Sec. 5 (4).
[5] Sec. 5 (6).
[6] Sec. 5 (7).
[7] 7 Edw. VII. c. 51, ss. 3 (*p*), 50.
[8] Sec. 5 (8).
[9] Sec. 6; 11 (1) (*b*).
[10] Sec. 8 (1).
[11] Sec. 8 (3).

719. Either party to a claim for compensation may require the Commissioners to assess the value of the land in respect of which the claim arises, and a copy of such assessment shall be sent by the Commissioners to the other party, and a certified copy of such assessment shall be admissible in evidence of that value in proceedings before the official arbiter, and the officer who made the assessment shall attend, if the official arbiter so require, to answer such questions as the official arbiter may think fit to put to him thereon.[7] This is an independent provision, not amounting to exclusion of the official arbiter's jurisdiction, but giving any party to a claim before the official arbiter power to obtain an assessment from the Commissioners as an adminicle of evidence to be adduced in the proceedings before the official arbiter either in support, or in challenge, of the claim made before him.

SECTION 7.—SUMMARY OF CHANGES EFFECTED.

720. The chief changes effected by the Act in the law of compulsory purchase may be conveniently summarised as:—

(i) The substitution, within the scope of the statute, of an arbitration tribunal in all cases of compulsory acquisition of land, except where parties agree to a reference otherwise;[8]
(ii) A fixing of the basis of assessment in terms of the statutory rules[9];
(iii) The conferring of power to the promoters to abandon after the service of notice to treat;[10]
(iv) The conferring of a discretion to the assessing tribunal in the matter of costs;[11] and
(v) The conferring of a right of review by way of stated case.[12]

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[1] Sec. 8 (2).
[2] Sec. 8 (2) (*a*).
[3] Sec. 8 (2) (*b*).
[4] Sec. 8 (2) (*c*).
[5] Sec. 8 (2) (*e*).
[6] Sec. 8 (2) (*d*).
[7] Sec. 8 (4).
[8] Secs. 1, 8.
[9] Sec. 2.
[10] Sec. 5 (2).
[11] Sec. 5.
[12] Sec. 6.

PART IV.—STATUTORY MODIFICATIONS OF THE CLAUSES ACTS.

SECTION 1.—THE DEFENCE ACTS.

721. The Defence Acts, 1842 [1] and 1860,[2] as amended by subsequent statutes,[3] provide a code for the acquisition of lands similar to but independent of the Lands Clauses Acts, though the Lands Clauses Acts may be put into force thereunder.[4] The Acts apply where lands are required for the Ordnance Department or for military purposes. It is provided, however, that no lands shall be taken without the consent of the owners, unless the necessity or expediency of the taking be first certified by the lord lieutenant or two deputy lieutenants or by the governor or two deputy governors of the county, riding, stewartry, city, or place where the lands lie, and unless the taking be authorised by a warrant under the hands of the Lord High Treasurer, or of the Commissioners of the Treasury or any three or more of them, or unless the enemy shall have actually invaded the United Kingdom when the lands are taken.[5] Compensation is assessed by arbitration,[6] and the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, will apply.[7] The Defence Acts have been applied to the Air Force by Order in Council.[8]

SECTION 2.—THE MILITARY LANDS ACTS.

722. Under the Military Lands Act, 1892,[9] a Secretary of State, for the military purposes of any portion of the military forces, or a territorial corps, with the consent of the Secretary of State, or a county council or town council, at the request of a territorial corps, may purchase lands for military purposes.[10] The Lands Clauses Act, with the exception of ss. 15 and 16, and with an amendment of ss. 85 and 123, and a provision that compensation may in all cases be settled by arbitration, are incorporated with this Act, which is deemed to be the special Act, but the compulsory clauses of the Lands Clauses Act cannot be put into force without a Provisional Order of the Secretary of State, confirmed by Parliament.[11] Special provision is made for the disposal of the land on the disbandment of the corps.[12] "Military purposes" includes rifle or artillery practice, the building and enlarging of barracks and camps, the erection of butts, targets, batteries, and other accommodation, the storing of arms, military drill, and any other purpose connected with military matters approved by the Secretary of State.[13] "Land" includes any easement in or over lands, and for the purposes of acquisition includes any right of firing over lands or other right of user; [13] it also includes the bed of the sea or any tidal water, and also any right of interference with the free use of any land.[1] The Military Lands Acts have been applied to the Air Force,[2] the Naval Volunteer Reserve,[3] and for civil aviation purposes,[4] and are in part applicable for certain purposes of the Coal Mines Act, 1911.[5]

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[1] 5 & 6 Vict. c. 94.

[2] 23 & 24 Vict. c. 112, s. 46.

[3] 22 Vict. c. 12, s. 4 ; 54 & 55 Vict. c. 54, s. 11.

[4] 23 & 24 Vict. c. 106, s. 7.

[5] 5 & 6 Vict. c. 94, s. 23.

[6] 54 & 55 Vict. c. 54, s. 11.

[7] 9 & 10 Geo. V. c. 57, s. 1.

[8] S.R. & O., 1918, No. 538 ; S.R. & O., 1923, No. 403.

[9] 55 & 56 Vict. c. 43.

[10] Secs. 1, 25 ; S.R. & O., 1912, No. 1814.

[11] Secs. 2, 20, 25 ; 63 & 64 Vict. c. 56, ss. 4, 5.

[12] Sec. 8.

[13] Sec. 23.

SECTION 3.—ADMIRALTY LANDS AND WORKS.

723. The Admiralty code for the acquisition of land is contained in the Admiralty Lands and Works Act, 1864.[6] The Act incorporates the Lands Clauses Acts except that the compulsory clauses are exercisable only if compulsory powers of taking particular lands are conferred by special Act. The following modifications are also made. "Lands" includes any estate, term, easement, right, or interest in, to, or over, or affecting lands.[7] The provisions for access to the special Act are omitted.[8] The Admiralty may abandon a notice to treat within two months, subject to compensation for damage, if any.[9] The prescribed limit for the exercise of the compulsory powers is fixed at five years.[10] The clauses relating to the disposal of superfluous lands and to the effect of the word "dispone" are omitted but, if the Admiralty sells, the rights of pre-emption are preserved.[11] Provision is made for giving a good title to a purchaser from the Admiralty, notwithstanding that any interest in the lands has been omitted to be purchased.[12] The Admiralty is not liable to any penalties.[13]

724. For the purposes of the Royal Naval Volunteer Reserves the Admiralty may put in force the provisions of the Military Lands Acts.[14]

SECTION 4.—THE POST OFFICE.

725. The acquisition of lands by the Postmaster-General is regulated by the Post Office Act, 1908.[15] It incorporates the Lands Clauses Acts except the provisions relating to access to the special Act, but the compulsory clauses can only be put into force after a local inquiry, and application to Parliament for an Act to include the lands required. "Land" includes any right or easement in, over, or in respect of land.[16]

SECTION 5.—DEFENCE OF THE REALM (ACQUISITION OF LAND) ACTS.

726. Under these Acts, which incorporated the Lands Clauses Acts with considerable modifications, extensive powers of compulsory acquisition were conferred upon government Departments.[17] These powers have however now expired.[1] The assessment of compensation fell under the jurisdiction of the official arbiter as from 1st September 1919.[2]

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[1] 63 & 64 Vict. c. 56, s. 3.

[2] S.R. & O., 1918, No. 538.

[3] 8 Edw. VII. c. 25.

[4] 10 & 11 Geo. V. c. 80, s. 15.

[5] 1 & 2 Geo. V. c. 50, s. 115.

[6] 27 & 28 Vict. c. 57.

[7] Sec. 2.

[8] Secs. 4, 5.

[9] Sec. 6.

[10] Sec. 8.

[11] Secs. 14–16.

[12] Secs. 18, 19.

[13] Sec. 25.

[14] 8 Edw. VII. c. 25; *supra*, para. 722.

[15] 8 Edw. VII. c. 48, ss. 45–47.

[16] Sec. 46.

[17] 6 & 7 Geo. V. c. 63; 9 & 10 Geo. V. c. 57, s. 7 (1); 10 & 11 Geo. V. c. 79.

SECTION 6.—THE DEVELOPMENT COMMISSIONERS.

727. The Development Commissioners appointed under the Development and Road Improvement Funds Act, 1909,[3] are given power to make Orders for the compulsory acquisition of lands in favour of Departments, bodies or persons promoting the development schemes enumerated in the statute, and in favour of the Road Board [4] or highway authorities making new roads or improving existing roads.[5] Certain restrictions are put upon the Commissioners as regards the class of lands which they may include in such Order.[6] The Order incorporates the Lands Clauses Acts and the mining code sections of the Railways Clauses Act.[7] The Schedule sets forth certain modifications of the Lands Clauses Acts which are in part superseded by the Acquisition of Lands (Assessment of Compensation) Act, 1919; [8] but the following provisions of the Schedule still apply. (1) In assessing compensation the arbiter shall have regard to the benefit accruing to the remaining land of the proprietor from the proposed works. (2) The provisions as to sale of superfluous lands do not apply. (3) If the arbiter is of opinion that a building can be severed without material detriment thereto the undertakers cannot be compelled to take the whole building. (4) Servitudes may be continued or be created over the land acquired; and (5) Land includes servitudes.

SECTION 7.—FORESTRY.

728. On the application of the Forestry Commissioners the Development Commissioners may make an Order authorising the acquisition of lands.[9] The procedure and form of Order follows closely that made under the Development, etc., Act, 1909,[3] except that in so far as the Order authorises the acquisition of any land forming part of a common, open space, or allotment, it shall be provisional only, until confirmed by Act of Parliament, except in certain specified circumstances.[10] The Forestry Commissioners may also confer haulage rights through any wood or forest by making an Order that the owner or occupier of any land shall confer such facilities, subject to an appeal against such Order to the Development Commissioners.[11]

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[1] 6 & 7 Geo. V. c. 63, s. 3 (4); 12 & 13 Geo. V. c. 47, s. 1 (3).

[2] 9 & 10 Geo. V. c. 57, ss. 1, 7 (1), 12.

[3] 9 Edw. VII. c. 47.

[4] Now the Minister of Transport; 10 & 11 Geo. V. c. 72 Sched.

[5] Secs. 5, 11; see also 5 Geo V. c. 4, s .1 (2) (*d*) (drainage improvement); 13 & 14 Geo. V. c. 21, s. 2 (2) (forestry); 15 & 16 Geo. V. c. 68, ss. 2, 3, 5 (5), 9, 12 (roads).

[6] Secs. 5, 11; and see 10 Edw. VII. c. 7, s. 3.

[7] Sched.

[8] *Supra*, para. 709 *et seq.*

[9] 9 & 10 Geo. V. c. 58, s. 7, Sched.

[10] Sec. 7 (3).

[11] Sec. 7 (4).

SECTION 8.—LAND SETTLEMENT.

729. For the purpose of providing experimental small holding colonies the Board of Agriculture for Scotland is given power to acquire land compulsorily.[1] The Board is restricted in the class of lands which it may acquire,[2] and the provisions of ss. 83 to 88 of the Lands Clauses Act with regard to entry are not applicable.[2] The lands to be acquired are specified in an Order of the Board.[3] The Order incorporates the Lands Clauses Acts and the mining code of the Railways Clauses Acts, but excludes the provisions relating to the sale of superfluous lands.[4] The Draft Order may be objected to within a specified time, and the Board may withdraw or modify the Order.[5] The Draft Order must be approved by the Secretary of State, after which it has the effect of an Act of Parliament.[6] "Land" includes water and any right or servitude to or over land or water.[7]

SECTION 9.—SMALL LANDHOLDERS ACTS.

730. The Board of Agriculture is given power to create new and to enlarge existing small holdings under the Small Landholders Acts.[8] The procedure, however, does not fall under the Lands Clauses Acts or the Compulsory Acquisition of Land (Assessment of Compensation) Act, 1919, and the powers exercised by the Board are not properly powers of purchase at all.[9] The subject will be dealt with elsewhere.[10]

SECTION 10.—LOCAL AUTHORITIES.

SUBSECTION (1).—*Town Councils.*

731. Some of the special statutory powers of local authorities have already been referred to.[11] Others it is unnecessary to deal with at length. Town Councils have power to acquire land for public parks under the procedure set forth in the Public Parks (Scotland) Act, 1878.[12] They may also acquire land compulsorily for cleansing purposes,[13] for street improvement,[14] for removal of dangerous buildings,[15] for purposes of water supply in burghs with under 5000 of a population,[16] and for the formation of air space[17] under the Burgh Police Acts. In certain cases the authority of the sheriff is necessary to put in force the Lands Clauses Acts.[1] "Land" in the Burgh Police Act and Lands Clauses Acts incorporated therewith includes water and any right or servitude to or over water.[2]

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[1] 9 & 10 Geo. V. c. 97, s. 1; *cont.* by 16 & 17 Geo. V. c. 49.

[2] Sec. 3.

[3] Sched. I. (1).

[4] Sched. I. (2).

[5] Sched. I. (3)–(5).

[6] Sched. I. (7).

[7] Sched. I. (8) (*b*).

[8] 1 & 2 Geo. V. c. 49, s. 7; 9 & 10 Geo. V. c. 97, ss. 9, 17, 32, Scheds. II. and IV.; 49 & 50 Vict. c. 29, ss. 11–15, 21; 1 & 2 Geo. V. c. 49, s. 16; 9 & 10 Geo. V. c. 97, s. 11.

[9] *Stair Estates* v. *Board of Agriculture*, 1926 S.C. 553, at pp. 560, 563.

[10] See SMALL LANDHOLDERS ACTS.

[11] *Supra*, para. 660.

[12] 41 Vict. c. 8. See also 55 & 56 Vict. c. 55, s. 307, as amended by 3 Edw. VII. c. 33, s. 104 (2) (*q*).

[13] 55 & 56 Vict. c. 55, s. 108.

[14] *Ibid.*, s. 154. No acquisition under s. 158, *Mags. of Inverness* v. *Groat*, 1898, 5 S.L.T. 408.

[15] *Ibid.*, s. 193.

[16] *Ibid.*, s. 262.

[17] 3 Edw. VII. c. 33, s. 73.

SUBSECTION (2).—*Public Health Authorities and County Councils.*

732. For the purposes of water, drainage, and certain other purposes under the Public Health Acts,[3] for water and drainage purposes under the Burgh Sewerage, etc., Act, 1901,[4] and for county council purposes under the Local Government Acts,[5] the respective local authorities may resort to the procedure of s. 145 of the Public Health Act, 1897, in order to put in force the Lands Clauses Acts, including the compulsory clauses thereunder.[6] The section imposes certain restrictions on the class of lands which can be acquired.[7] Where authority to exercise compulsory powers is obtained, s. 6 and ss. 70 to 78 of the Railways Clauses Acts are also incorporated in the order conferring the power.[8] "Land" in the Public Health Act and any Acts incorporated therewith includes water and any right or servitude over land or water.[9]

SUBSECTION (3).—*Education Authorities.*

733. An education authority desiring compulsory powers may apply to the Scottish Education Department for an Order in accordance with the First Schedule of the Housing, etc., Act, 1909.[10] In the case of land which belongs to a local authority or to a railway, dock, canal, or water undertaking, or forms part of a park, garden, or pleasure ground, or is otherwise required for the amenity or convenience of a dwelling-house, the Order requires to be confirmed by Parliament.[10] "Land" includes water and any right or servitude over land or water.[10]

SUBSECTION (4).—*Parish Councils.*

734. A parish council may obtain compulsory powers by applying to the County Council for an order incorporating the compulsory clauses of the Lands Clauses Acts.[11] After sundry procedure the Order, if made by the County Council and confirmed by the Board of Health, has the effect of an Act of Parliament.[12] Certain restrictions are made as regards the class of lands that can be acquired under this procedure.[13] There is incorporated with the Order ss. 6 and 70–78 of the Railways Clauses Acts as well as the Lands Clauses Acts.[1]

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[1] 55 & 56 Vict. c. 55, s. 60.

[2] 60 & 61 Vict. c. 38, s. 124.

[3] *Ibid*, s. 144.

[4] 1 Edw. VII. c. 24, s. 5.

[5] 8 Edw. VII. c. 62, s. 5; 3 & 4 Geo. V. c. 37, s. 41 (tuberculosis).

[6] See *Campbell* v. *Northern District Committee of County Council of Ayr*, 1904, 11 S.L.T. 587 as to necessity of adopting this procedure in order to bring into operation the Lands Clauses Acts notwithstanding the general incorporation of these Acts by s. 4 of the Public Health Act.

[7] 60 & 61 Vict. c. 38, s. 145 (13), (14).

[8] *Ibid.*, s. 145 (4).

[9] *Ibid.*, s. 3.

[10] 8 & 9 Geo. V. c. 48, s 11. The Act of 1909 is preserved for this purpose by 15 Geo. V. c. 15, Sched. VI.

[11] 57 & 58 Vict. c. 58, s. 25.

[12] *Ibid.*, s. 25 (7) (c).

[13] *Ibid.*, s. 25 (13), (14).

SUBSECTION (5).—*Other Authorities.*

735. A district board of control, with consent of the General Board of Control, may resort to the procedure of s. 145 of the Public Health Act to obtain compulsory powers to acquire land.[2] "Land" includes water, and any right or servitude over water.[3]

Burial-ground authorities may exercise compulsory powers to obtain ground for cemeteries, crematoria, and enlargement of churchyards by application to the sheriff.[4]

Electricity authorities and undertakers may be authorised to acquire land compulsorily, for the purpose of generating stations, by Provisional Order of the Electricity Commissioners incorporating the Lands Clauses Acts with certain modifications,[5] and the Electricity Board may, subject to certain restrictions, obtain similar authority for the purpose of any of their powers and duties under the Electricity (Supply) Act, 1926.[6]

In the matter of roads compulsory powers may be operated by road authorities under the Development and Road Improvement Funds Act, 1909,[7] the Roads Improvement Act, 1925,[8] and the Unemployment (Relief Works) Act, 1920.[9]

SECTION 11.—HOUSING.

736. A variety of powers of compulsory purchase are contained in the Housing (Scotland) Act, 1925.[10]

SUBSECTION (1).—*Obstructive Buildings.*

737. Where an order by the local authority to pull down an obstructive building becomes effective, the local authority is empowered within a space of one year to purchase the land on which the building is erected, in terms of the Lands Clauses Acts as modified by the Housing Act.[11] The owner, however, has an option to retain the site, receiving compensation for the destruction of the building.[12] The owner cannot compel the local authority to acquire the whole property if in the opinion of the arbiter severance can be made without material detriment to the remainder of the property.[13] If the buildings obstructed are enhanced in value by the removal of the obstructive building the arbiter must apportion a part of the compensation on these buildings,[14] and if the owner or occupier of any of these buildings is aggrieved by such apportionment the matter is settled by the sheriff as under the Lands Clauses Acts where compensation claimed does not exceed £50.[1] The superior of the lands, if he gives notice to the local authority, is entitled to notice of all proceedings by the local authority,[2] and he may by order of the sheriff claim to retain the site if default is made by the proprietor.[3] The arbiter to assess the value of the land or damage by removing the building would seem to be the official arbiter,[4] but for apportioning any benefit on adjoining buildings a special arbiter may be appointed by the Board of Health, when the compensation otherwise has been settled by agreement.[5] The assessment of compensation is regulated by Parts II. and III. of the First Schedule to the Act.[6]

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[1] 57 & 58 Vict. c. 58, s. 25 (10).

[2] 3 & 4 Geo. V. c. 38, s. 68.

[3] *Ibid.*, s. 68 (5).

[4] 18 & 19 Vict. c. 68, s. 13; 2 Edw. VII. c. 8, s. 4; 15 & 16 Geo. V. c. 33, s. 32.

[5] 9 Edw. VII. c. 34, s. 1, Sched. I.; 9 & 10 Geo. V. c. 100, s. 15 (3).

[6] 16 & 17 Geo. V. c. 51, s. 21.

[7] See *supra*, para. 727.

[8] 15 & 16 Geo. V. c. 68.

[9] 10 & 11 Geo. V. c. 57, *cont.* by 16 & 17 Geo. V. c. 49.

[10] 15 Geo. V. c. 15.

[11] *Ibid.*, s. 15 (1), (2).

[12] *Ibid.*, ss. 15 (3), 23 (3).

[13] *Ibid.*, s. 15 (5).

[14] *Ibid.*, s. 15 (6), (7).

SUBSECTION (2).—*Reconstruction and Improvement Schemes.*

738. If the Board confirms such a scheme the confirming order generally incorporates the Lands Clauses Acts as modified by the Second Schedule to the Act.[7] That schedule provides for a legal progress of title-deeds, and gives power to take part of a building if the arbiter decides that such can be taken without material detriment to the remainder. Upon a scheme being confirmed the local authority must take steps to purchase the lands included therein,[8] within three years of the confirming Order.[9] The local authority has a limited power to abandon portions of the scheme, with the consent of the Board, or to modify the same in details.[10] Compensation is settled by arbitration,[11] *i.e.* under the Acquisition of Land, etc., Act, 1919.[12] The compensation paid to the owner of insanitary dwellings included in the scheme is determined in the main by their site value, subject to a specified reduction where the land should in the opinion of the Board be used for rehousing the working classes or as an open space.[13] In the case of lands and premises which are included to make the scheme efficient, compensation is calculated in accordance with the provisions of Part I. of the First Schedule.[14] Compensation must also be paid for any loss sustained by the extinction of servitudes over the land required.[15]

SUBSECTION (3).—*Acquisition of Land for Houses.*

739. Subject to certain restrictions as to the class of land to be acquired,[16] the local authority is given power to acquire compulsorily land as a site for working-class houses under Part III. of the Housing Act.[17] Power is obtained by an Order of the Board incorporating the Lands Clauses Acts (except s. 120 of the Act of 1845), as modified by the Acquisition of Land (Assessment of Compensation) Act, 1919, and ss. 70–78 of the Railways Clauses Act.[1] The sections of the Railways Clauses Act are as originally enacted, and not the substituted sections of the Mines (Working Facilities and Support) Act, 1923.[2]

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[1] 15 Geo. V. c. 15, s. 15 (6), (7).
[2] *Ibid.*, s. 23 (1).
[3] *Ibid.*, s. 23 (2).
[4] 9 & 10 Geo. V. c. 57, s. 1; 15 Geo. V. c. 15, Sched. I., Pt. II. (5), Pt. III. (3).
[5] 15 Geo. V. c. 15, s. 15 (5).
[6] *Ibid.*, s. 16.
[7] *Ibid.*, s. 31 (4), Sched. II.
[8] *Ibid.*, s. 33 (1).
[9] *Ibid.*, s. 31 (4).
[10] *Ibid.*, s. 35.
[11] *Ibid.*, ss. 31 (4), 36.
[12] *Ibid.*, s. 37 (2), Sched. I. Pt. I. (4); 9 & 10 Geo. V. 57, s. 1.
[13] *Ibid.*, s. 37 (1).
[14] *Ibid.*, s. 37 (3).
[15] *Ibid.*, s. 36
[16] *Ibid.*, ss. 51, 86, 87, 88.
[17] *Ibid.*, ss. 44, 51.

SUBSECTION (4).—*General Provisions.*

740. A local authority may, upon notice to the owner and occupier, enter on lands to be acquired under an improvement or reconstruction scheme or for housing purposes without complying with ss. 83–88 of the Lands Clauses Acts, subject to paying interest as from the date of entry on the sum awarded as compensation.[3] Any person authorised by the Board or local authority may, on twenty-four hours' notice, enter any house, premises, or building for purposes of survey or valuation.[4] An heir of entail in possession may, notwithstanding any prohibition or limitation in any deed of entail or Act of Parliament, sell or feu to a local authority any part of the entailed estate for the purposes of the Housing Act, without obtaining any consents and without restriction as to the extent of land sold or feued, excepting always the mansion-house and policies adjacent thereto, provided that the price is invested in accordance with the Entail Acts, and that no grassum or consideration other than a feu-duty is taken for land feued.[5] This provision may supersede the necessity of a valuation under the Lands Clauses Act.[6] Any compensation paid to another local authority need not be paid into bank under the Lands Clauses Acts if the Board otherwise directs.[7] Sec. 127 of the Lands Clauses Act does not apply to lands acquired by a local authority under the Act.[8] "Land" includes any right over land.[9] "Owner" includes any person entitled to sell under the Lands Clauses Acts.[9]

SECTION 12.—TOWN PLANNING.

741. For the purposes of a town planning scheme a local authority may be authorised to purchase land compulsorily by an Order of the Scottish Board of Health incorporating the Lands Clauses Acts (except s. 120 of the Act of 1845), as modified by the Acquisition of Land (Assessment of Compensation) Act, 1919,[10] and ss. 70–78 of the Railways Clauses Act as originally enacted.[11] Certain restrictions are imposed as to the class of land which may be purchased for such a scheme.[12] The Board may make regulations dealing with the extinction or variation of servitudes over land acquired, the disposal of land acquired, and powers of entry and inspection.[13]

742. Compensation will be assessed under the Acquisition of Land

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[1] Sec. 51, Sched. III.

[2] Sched. III. (7).

[3] *Ibid.*, s. 89.

[4] *Ibid.*, s. 109.

[5] *Ibid.*, s. 110.

[6] See 8 & 9 Vict. c. 19, s. 9.

[7] 15 Geo. V. c. 15, s. 113.

[8] *Ibid.*, s. 115.

[9] *Ibid.*, s. 119.

[10] 15 Geo. V. c. 17, s. 8 (3), (5), Sched. III. Pt. I.

[11] *Ibid.*, Sched. III. Pt. I. (3), (*b*), (7).

[12] *Ibid.*, ss. 8 (6), 19, Sched. III. Pt. II.

[13] *Ibid.*, s. 5, Sched. I.

(Assessment of Compensation) Act, 1919.[1] Special provision is made for persons injuriously affected. They are entitled to compensation on making a claim within the time prescribed by the Board ;[2] but claims are cut down, subject to certain exceptions, in respect of loss incurred through any act done by any such person in respect to land included in the scheme after the date of the resolution of the local authority to prepare or adopt the scheme, or after the date when such resolution takes effect, or after the date when the Board has authorised a scheme to be made, or after such other time as the Board may fix.[3] Compensation in respect of injurious affection is fixed by the official arbiter unless the parties agree on some other method of determination.[4]

743. No claim for injurious affection can be entertained when caused by provisions in a scheme which are already contained in a public, general, or local Act, or Order having the force of an Act of Parliament, or which would have been enforceable by bye-laws of the local authority, or which prescribe the space about buildings, or limit the number of buildings, or prescribe the height or character of buildings.[5] If entitled to compensation in respect of the same injury under any other enactment the claimant cannot recover twice, and cannot recover more than he would be entitled to under such other enactment.[6]

744. If a scheme is revoked by the Board, any loss sustained by abortive expenditure incurred by any person in complying with the scheme is similarly assessed.[7] The authority may make a claim for enhancement of value occasioned by the making of a scheme and recover from the person whose property is increased in value one-half of the amount of the increase.[8] Such a claim is determined in the same manner as a claim for injurious affection.[4]

745. Compensation paid by one local authority to another local authority need not be paid into bank under the Lands Clauses Acts, but may be applied as the Board determines.[9]

746. Within one month of the fixing of compensation for injurious affection the authority may give notice of withdrawal of the provisions giving rise to such claim, and submit a varying scheme to the Board for approval.[10] The owner's expenses of and in connection with the arbitration must in such case be paid by the authority.[10] The owner may prefer a further claim in respect of the scheme as varied.[10]

747. The Board for itself, and on behalf of local authorities or authorised associations,[11] may acquire land in certain cases and subject to certain consents, for the development of garden cities or future town-planning schemes. In the case of an authorised association the Board's Order is subject to approval by both Houses of Parliament, and to modifications agreed by both Houses.[12] The Board, in the matter of such acquisition, is subject to all the provisions of the Act relating to purchase by a local authority; and a local authority may itself acquire land for the purposes of a scheme so approved by the Board.[1]

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[1] 9 & 10 Geo. V. c. 57.

[2] 15 Geo. V. c. 17, s. 10 (1).

[3] *Ibid.*, s. 10 (2).

[4] *Ibid.*, s. 10 (4).

[5] *Ibid.*, s. 11 (1), (2).

[6] *Ibid.*, s. 11 (3).

[7] *Ibid.*, s. 10 (6).

[8] *Ibid.*, s. 10 (3), (5).

[9] *Ibid.*, s. 9.

[10] *Ibid.*, s. 12.

[11] *Ibid.*, s. 15.

[12] *Ibid.*, s. 15 (2).

SECTION 13.—ALLOTMENTS.

748. A town council or parish council may provide ground for allotments under the Allotments Acts.[2] An Order for the compulsory purchase of lands for allotments is made by the Board of Agriculture,[3] and follows the procedure and takes the form of an Order under the Land Settlement Acts.[4] The class of lands which may be so acquired is restricted.[5] If notice to treat under the Order is not served by the local authority within three months after making the Order, the Order, in so far as it relates to land in respect of which notice to treat has not been served, becomes null and void,[6] and the land may not be reinserted in any further Order within a period of three years without special reasons proved to the satisfaction of the Board.[7] Apart from compulsory purchase of land, the local authority may apply to the Board for an Order for compulsory leasing.[8] The lease must be for not less than ten nor more than thirty-five years,[9] subject to a right of resumption in the case of a railway, dock, canal, water, or other public undertaking.[8] The procedure is the same as in obtaining an Order for compulsory purchase,[10] but it is not necessary for the Board to incorporate any provision of the Lands Clauses Acts or Railways Clauses Acts, except what appears to the Board sufficient to carry into effect the Order, and protect the persons interested.[11] The Order may not authorise the leasing of minerals, and does not confer right to take, sell, or carry away any stone, gravel, sand, or clay.[12] Compensation is assessed by the official arbiter in compulsory leasing as well as in compulsory purchase, and special powers are conferred on him in this connection.[13] Counsel may not be heard in any arbitration under the Allotments Acts or as to compensation for lands acquired, unless the Board otherwise direct.[14]

SECTION 14.—TRADING UNDERTAKINGS.

749. Trading undertakings depend generally upon their special Acts or Orders for their compulsory powers, but in the matter of railways the Minister of Transport may now confer power of acquiring land, including servitudes, for effecting alterations, extensions, and improvements of existing works.[1] The Minister of Transport may also grant compulsory powers for acquiring land by a railway company for electrical generating stations and works, subject to confirmation by Act of Parliament,[2] or make an Order authorising the acquisition of lands for a light railway, with the modifications of the Lands Clauses Acts authorised by the Development, etc., Act, 1909, subject to confirmation, if he thinks necessary, by Act of Parliament.[3] Electricity undertakings are dealt with above.[4]

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[1] 15 Geo. V. c. 17, s. 15 (3).

[2] 55 & 56 Vict. c. 54; 9 & 10 Geo. V. c. 97; 12 & 13 Geo. V. c. 52.

[3] 12 & 13 Geo. V. c. 52, s. 8 (3), (i), (iii).

[4] *Supra*, para. 729.

[5] 55 & 56 Vict. c. 54, s. 3 (5) as amended 9 & 10 Geo. V. c. 97, Sched. III.

[6] 12 & 13 Geo. V. c. 52, s. 13 (1).

[7] *Ibid.*, s. 13 (2).

[8] *Ibid.*, s. 8 (3) (ii).

[9] *Ibid.*, s. 6 (2) (*a*).

[10] *Ibid.*, s. 8 (3) (iii).

[11] *Ibid.*, Sched. II. (*e*).

[12] *Ibid.*, s. 6 (2) (*c*).

[13] 9 & 10 Geo. V. c. 97, Sched. I. (6) (*a*); 12 & 13 Geo. V. c. 52, s. 6 (2) (*d*), Sched. II.

[14] 12 & 13 Geo. V. c. 52, s. 8 (1).

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[1] 9 & 10 Geo. V. c. 50, ss. 3 (1) (*d*), 29, Sched. II.; 11 & 12 Geo. V. c. 55, s. 17.

[2] 3 Edw. VII. c. 30.

[3] 59 & 60 Vict. c. 48, ss. 11 (*a*), 12 (1), 28 2 & 3 Geo. V. c. 19, ss. 1, 4; 11 & 12 Geo. V. c. 55, ss. 68, 69. See also *supra*, para. 727.

[4] *Supra*, p. 323.

COMPUTATION OF TIME.

See TIME.

CONCEALMENT.

See FRAUD AND MISREPRESENTATION.

CONCEALMENT OF PREGNANCY.

See CRIME.

CONCOURSE OF PUBLIC PROSECUTOR.

See CRIME (CRIMINAL ADMINISTRATION).

CONCURSUS DEBITI ET CREDITI.

See COMPENSATION; CONFUSIO; CONSOLIDATION; RETENTION.

CONDESCENDENCE.

See PRACTICE AND PROCEDURE.

CONDICTIO INDEBITI.

See ERROR; MAXIMS; REPETITION.

CONDITIO SI SINE LIBERIS.

TABLE OF CONTENTS.

Introductory . . . . . PAGE 330

PART I.—CONDITIO SI TESTATOR SINE LIBERIS DECESSERIT.

General Principle 331
Conditions of its Application . . 331
How excluded. 332
  Written Evidence of Intention to Exclude 332
  Effect of Lapse of Time after Date of Will 333
  Predecease of Child born after Date of Will 333
  Where Children provided for in Marriage Contract . . . 334
Result of Applying *Conditio* . . PAGE 334

PART II.—CONDITIO SI INSTITUTUS SINE LIBERIS DECESSERIT.

General Principle 335
Subjects to which Applicable . . 336
Object of Bequest 337
Parent must be Instituted . . 338
Bequests to Conditional Institutes . 339
Bequests by Persons *in loco parentis* . 339
Excluded by *delectus personæ* . . 340
Distribution of Bequest where *Conditio* admitted 341
Accretion 342

INTRODUCTORY.

750. It is a cardinal rule in the interpretation of wills that a testator's intentions are to be gathered from the writings themselves and not from extrinsic sources. But the laws of various countries have recognised that the strict observance of this rule may in certain circumstances result in defeating what they presume would have been his real intentions if the testator had had before his mind the possible occurrence of certain events against which the natural duties arising out of the relationship of parent and child would have led him to provide. It is notorious that testators sometimes fail to provide in their settlements for the event of their having children or of having additional children. Sometimes, too, it may be, they make bequests to near relatives, whom failing to strangers, overlooking the possibility of these relatives having issue. In these two directions the common law of Scotland, adopting the principle from the Roman law, has admitted presumptions which, unless rebutted by competent evidence, will modify the terms of a will, or even make it invalid.

751. These presumptions or implied conditions are known as the *conditio si testator sine liberis decesserit* and the *conditio si institutus sine liberis decesserit*. The operation of the former renders the will invalid; the latter introduces a conditional institution of children of the institute. The doctrine seems to have been introduced into our law in the eighteenth century and obviously came from the Roman law;[1] but its application in Scots law has been different from that in Roman law. "In its primary application the doctrine was probably confined to the simple case in which a father without children makes a settlement in favour of a third party, and that settlement is held evacuated by the emergence of a child. . . . But for a long time past the scope of the maxim has been greatly extended." [1]

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[1] *Mags. of Montrose* v. *Robertson*, 1738, Mor. 6398; *Yule* v. *Yule*, 1758, Mor. 6400; *Douglas's Exrs.*, 1869, 7 M. 504; *Hall* v. *Hall*, 1890, 18 R. 690; *Knox Trs.* v. *Knox*, 1907 S.C. 1123; *Blair's Exrs.* v. *Taylor*, 1876, 3 R. 362, per Lord Neaves at p. 367.

PART I.—CONDITIO SI TESTATOR SINE LIBERIS DECESSERIT.

SECTION 1.—GENERAL PRINCIPLE.

752. When a testator dies leaving a general settlement which makes no provision for children born to him after its date (whether born during the lifetime of the testator or posthumously), the law presumes that the omission to provide for such children was unintentional, and unless the presumption is rebutted the settlement is treated as revoked.

753. The presumption is a strong one and can only be overcome by convincing evidence. "The general rule is, that unless it is as plain as a pike-staff that the testator did not intend the succession to go to the child, the condition will apply." [2] As it is only an equitable presumption, it must yield to contrary evidence, for "the implied will of a testator ought not to be superinduced upon what he has expressed, except in circumstances making it clear that his true intention is not thereby violated, and a settlement made for him which he would not have made for himself." [3] The whole circumstances must be regarded.[4]

SECTION 2.—CONDITIONS OF ITS APPLICATION.

754. In order that the *conditio si testator* may apply, it is essential that the settlement should be universal. A settlement containing legacies which exhaust the estate may be in substance universal even although it contain no residuary bequest.[5] On the other hand, a settlement may be in form universal and yet only deal with a part of a testator's estate, the remainder having been settled previously by marriage contract, in which case both deeds may have to be read together in order to arrive at the testator's intention.[1] If the settlement is only a partial one and contains no provisions in favour of children *nascituri* it may well be a fair inference that the testator intended such children to take their legal rights of legitim and their share of dead's part so far as undisposed of, and in such circumstances the *conditio* will not apply.[1] "The fact that he has omitted to deal with other portions of the estate, or to deal completely with those portions that he mentions in his settlement, does not create any presumption that he has overlooked them."[2]

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[1] Per Lord Kinloch in *Grant's Trs.* v. *Grant*, 1862, 24 D. 1211, at p. 1220.

[2] *Colquhoun* v. *Campbell*, 1829, 7 S. 709, per Lord Glenlee.

[3] *Blair's Exrs.* v. *Taylor*, 1876, 3 R. 362, per Lord Ormidale at p. 368; *Wait* v. *Jervie*, 1760, Mor. 6401.

[4] *Hughes* v. *Edwards*, [1892] A.C. per Lord Watson at p. 591; 19 R. (H.L.) 33; *Millar's Trs.* v. *Millar*, 1893, 20 R. 1040; *Elder's Trs.* v. *Elder*, 1894, 21 R. 708, per Lord Adam and Lord Kinnear.

[5] *Yule* v. *Yule*, 1758, Mor. 6400; *Colquhoun* v. *Campbell*, 1829, 7 S. 709, per Lord Pitmilly; *Galloway* v. *Grant*, 1851, 13 D. 756; *Adamson's Trs.* v. *Adamson's Exrs.*, 1891, 18 R. 1133; *Munro's Exrs.* v. *Munro*, 1890, 18 R. 122; *Milligan's Judicial Factor* v. *Milligan*, 1910 S.C. 58.

755. Until the decision in *Elder's Trs.*[3] it had not been expressly decided that the *conditio si testator sine liberis decesserit* might take effect not only where a testator had no children at the date when his settlement was executed (as the earlier cases decided), but also where the testator had children at that date. The extension of the rule thus recognised in *Elder's Trs.* may now be regarded as settled law.[4] Where an illegitimate child was born to a testator after the date of his will, and the child was legitimated *per subsequens matrimonium*, it was held that the will was revoked, but it is not clear whether the revocation took place at the birth or at the legitimation of the child.[5]

SECTION 3.—HOW EXCLUDED.

SUBSECTION (1).—*Written Evidence of Intention to Exclude.*

756. If the testator has indicated clearly, either in his settlement or otherwise by writing,[6] that his omission to provide for his children was intentional, the *conditio* will not apply.[7] Thus, if after the birth of children who were born subsequent to the date of the settlement it is established that he treated the deed as still effectual,[8] or made a codicil or deed relating to his disposition of his estate in the will,[9] the presumption will be rebutted. Not only probative deeds but memoranda or letters under the hand of the testator may be referred to in order to ascertain his intention in this matter;[9] but it is not competent to prove, by parole, declarations of the testator's intention, either as setting up the will, or as fortifying the presumption against its subsistence.[6] The *conditio* does not apply to the case where a testator was in the knowledge of his wife's pregnancy at the time when his will was executed,[1] but if he was ignorant of that fact the result would be different.[2] As to the effect in evidence of unauthenticated alterations (not capable of receiving effect) on a settlement, and the preparation of a draft of a new will, reference is made to the undernoted cases.[3]

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[1] *Millar's Trs.* v. *Millar*, 1893, 20 R. 1040; *Dobie's Tr.* v. *Pritchard*, 1887, 15 R. 2.

[2] *Rankine* v. *Rankine's Trs.*, 1904, 6 F. 581, per Lord M‘Laren.

[3] *Elder's Trs.* v. *Elder*, 1894, 21 R. 704.

[4] *Knox's Trs.* v. *Knox*, 1907 S.C. 1123, per Lord Pres. Dunedin at p. 1129.

[5] *Crow* v. *Cathro*, 1903, 5 F. 950.

[6] *M‘Kie's Tutor* v. *M‘Kie*, 1897, 24 R. 526, per Lord M‘Laren.

[7] *M‘Kie's Tutor, supra*; *Milligan's Judicial Factor* v. *Milligan*, 1910 S.C. 58.

[8] *Rankine* v. *Rankine's Trs., supra*; *Stuart-Gordon* v. *Stuart-Gordon*, 1899, 1 F. 1005.

[9] *Smith's Trs.* v. *Grant*, 1897, 35 S.L.R. 129; *Elder's Trs.* v. *Elder, supra*; *M‘Kie's Tutor, supra*, per Lord M‘Laren.

SUBSECTION (2).—*Effect of Lapse of Time after Date of Will.*

757. Where a child is born after the date of the will without provision being made for it, and in circumstances shewing that the birth of the child was not contemplated, the *conditio* will, in general, be held to apply. It was for long a question whether the lapse of a considerable period between the birth of the child and the death of the testator could in itself be treated as indicating an intention on the part of the testator not to avail himself of the opportunity of providing for the child, and therefore as sufficient to displace the presumption. But it is now settled that this circumstance is not in itself a ground for refusing effect to the presumption.[4] The length of the period between the child's birth and the testator's death is, however, an element which will affect the force of other considerations bearing on the question, for, if that period is considerable, less pregnant circumstances will rebut the presumption than would be required in cases where the testator had not a reasonable period in which to reconsider his testamentary arrangements in view of the birth of the child.[5]

SUBSECTION (3).—*Predecease of Child born after Date of Will.*

758. If a child, unprovided for in a settlement, is born after its date in such circumstances as to permit of the application of the *conditio*, and dies before the testator, its parent, is the will to be regarded as set up again? The question was sharply raised in an interesting old case[6] where, in an antenuptial contract of marriage, the husband had provided an annuity of 200 merks to his wife, and 6000 merks to his children. Some years after his marriage, having no children, he made a universal settlement in favour of his wife of the estate belonging to him at the date of his death. He died about seven months after the execution of the will. Five weeks after his death his wife gave birth to a child which lived but a very few months. The child's next-of-kin claimed that the will had been voided, but the Court found in favour of the widow, holding that the child could only have obtained relief against the will in a Court of Equity, that a Court of Equity only gives relief so far as necessary to fulfil the rules of justice, that the child, having died when only a few months old, was not hurt by the settlement, that its right was at most only to reduce the will, and that as this had not been attempted, the settlement was good. In *Colquhoun* v. *Campbell*[1] it was decided that the benefit of the implied condition was personal, and that if the child had not had its right established by judicial finding, the right to claim does not pass to its representatives. In *Dobie's Tr.* v. *Pritchard*[2] Lord Rutherfurd Clark said: "Whether it [the will] could be set up again by the mere survivance of the maker without executing a subsequent deed I greatly doubt. I am much inclined to the opinion that the revocation was absolute, and that, even had the maker survived the birth of the child for a long time, the will could receive no effect. I doubt whether survivance, however long, would justify us in holding that a wish was implied that the will should receive effect." The question may, therefore, be regarded as an open one.

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[1] *Adamson's Trs.* v. *Adamson's Exrs.*, 1891, 18 R. 1133; *Watt* v. *Jervie*, 1760, Mor. 6401.

[2] *Dobie's Tr.* v. *Pritchard*, 1887, 15 R. 2, per Lord M'Laren.

[3] *Munro's Exrs.* v. *Munro*, 1890, 18 R. 122; (unauthenticated alterations) *Knox's Trs.* v. *Knox*, 1907 S.C. 1123 (draft of new will).

[4] *Knox's Trs.* v. *Knox*, *supra*; *Milligan's Factor* v. *Milligan*, 1910 S.C. 58; *Munro's Exrs.* v. *Munro*, *supra*.

[5] *Milligan's Factor*, *supra*.

[6] *Watt* v. *Jervie*, *supra*.

SUBSECTION (4).—*Where Children provided for in Marriage Contract.*

759. It is a question on which the decisions are not altogether in harmony whether the fact that a child born after the date of the will is included in the provisions made in the testator's antenuptial marriage contract may be taken into account in determining whether the birth has revoked the will. In *Millar's Trs.* v. *Millar*[3] it was held that a will was not revoked seeing that by his marriage-contract the testator had bestowed the bulk of his estate on his children *nati et nascituri*; in *Dobie's Tr.* v. *Pritchard*[2] in somewhat similar circumstances the *conditio* was applied. In *Rankine* v. *Rankine's Trs.*[4] Lord Kinnear observed in regard to the effect of a provision in a marriage contract: "We cannot infer from any other provision that the father set up this will as against this child."

SECTION 4.—RESULT OF APPLYING THE CONDITIO.

760. The result of applying the *conditio* is that the will is totally revoked in regard to its administrative as well as its beneficial provisions.[5] In some of the older cases it was supposed that the *conditio* might have the effect of admitting a posthumous child to a share of the provisions made in its father's settlement in favour of the children alive at its date, but this view has been rejected.[6] If there are no prior settlements the estate will fall to be distributed in intestacy. Where there are prior settlements difficult questions may arise as to whether they are set up by the revocation of the later one. In *Elder's Trs.* v. *Elder*[7] it was held that there is no presumption that a prior will which has been *expressly* revoked by a later will (itself revoked by the *conditio*) is set up, although it contains provisions for children *nascituri*. In that case Lord M'Laren said: "I should be disposed to hold that whenever a last will is cut down by the operation of the rule or presumption that we are now considering, all previous testamentary settlements must fall along with it except such as are obligatory and matter of contract." In *Nicolson* v. *Nicolson's Tutrix*[1] a testator left testamentary writings, both made after the birth of his elder daughter and before the birth of his younger child. The first was a settlement which contained provisions in favour of children *nascituri*: the second was a holograph settlement which disposed of his whole estate and thereby impliedly revoked the earlier settlement; it made no provision for children, and contained a bequest of the testator's whole estate to his widow. The Court held that the deceased's succession fell to be regulated by the earlier settlement in respect that the revocation of it by the second deed was not an express but only an implied revocation, and had been rendered ineffective by the revocation of that deed through the operation of the *conditio*.[2]

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[1] 1829, 7 S. 709. See also *Smith's Trs.* v. *Grant*, 1897, 35 S.L.R. 129.

[2] 1887, 15 R. 2.

[3] 1893, 20 R. 1040.

[4] 1904, 6 F. 581.

[5] *Crow* v. *Cathro*, 1903, 5 F. 950; *Knox's Trs.* v. *Knox*, 1907 S.C. 1123.

[6] *Spalding* v. *Spalding's Trs.*, 1874, 2 R. 237; *Findlay's Trs.* v. *Findlays* (O.H.), 1886, 14 R. 167.

[7] 1895, 22 R. 505.

PART II.—CONDITIO SI INSTITUTUS SINE LIBERIS DECESSERIT.

SECTION 1.—GENERAL PRINCIPLE.

761. The *conditio si sine liberis* is also applied in certain circumstances in the case of bequests by a testator to near relatives. The effect of its application is that if the legatee dies without taking a vested interest in the bequest his children are impliedly instituted in his place.[3] Where the *conditio* thus operates it will prevent the bequest from falling into residue or intestate succession, or even defeat a gift over or the exercise of a power of disposal by will.[4]

762. The circumstances which have been considered of importance in determining whether the *conditio* applies are numerous, seldom appear singly, and often involve difficulty.[5] Lord Justice-Clerk Moncreiff, in a well-known opinion,[6] summarised the law in the following words: "The application of the *conditio si sine liberis* has been made the subject of discussion under a great variety of circumstances. The *conditio* has been held to apply where the settlement is universal, where the beneficiaries are a class and the provision is of the nature of a family settlement, and where the testator, if not a parent, is at all events *in*

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[1] 1922 S.C. 649.

[2] See *Crauford* v. *Coutts*, 1806, 5 Paton's App. 94; *Leith* v. *Leith*, 1863, 1 M. 955, per Lord Pres.

[3] *Innes* v. *Innes*, 1670, Mor. 4272; *Halliday*, 1869, 8 M. 112, per Lord Pres. at p. 115.

[4] See FACULTIES AND POWERS.

[5] See Lord Young's remarks in *Allan* v. *Thomson's Trs.*, 1893, 20 R. 733, as to the necessity for legislation on the subject.

[6] *Blair's Exrs.* v. *Taylor*, 1876, 3 R. 362.

loco parentis to the beneficiaries. Where all these conditions concur, the *conditio* will be applied. The effect given to these elements depends on two principles, first, that the *delectus personæ* implied in a *nominatim* bequest is excluded when the provision is to a class; and, secondly, that when the provision is of the nature of a family provision, and where the granter is *in loco parentis* to the beneficiaries, there is a presumption that the granter prefers the issue of a predeceasing beneficiary to any substitute named in the deed. On the other hand, it has been held that where the subject is a special legacy, where the legatees are called *nominatim* and not as a class, and where the testator is not *in loco parentis*, neither as a parent literally nor in the position of a parent, the *conditio* will not apply, upon this manifest principle, that a bequest to A, whom failing to B, without mention of A's heirs, is presumed, *ex figura verborum*, to go to B in the event of A's death before the testator." The solution will usually depend on a balancing of the various elements present, *i.e.* upon the construction to be put upon the settlement as a whole.

Section 2.—Subjects to which Applicable.

763. The *conditio* was at first applied only to dispositions *mortis causa* of moveable property;[1] but, later, it was extended to dispositions *mortis causa* of heritage.[2] It matters not whether the dispositions are contained in testaments,[3] marriage contracts,[4] or in any other deed disposing *mortis causa* of the disponer's property.[5] The *conditio* does not apply to destinations in leases which descend according to the strict terms of the destination;[6] or to bequests of specific articles such as pictures or furniture or plate;[7] or, probably, to the provisions of any deed which take effect *inter vivos*.[8]

764. It has been said that the *conditio* can apply only when the settlement is universal,[9] but though the universal character is a feature of importance in determining the question, many cases exist where the *conditio* was admitted in partial settlements.[10]

765. Where the bequest is a simple legacy, *e.g.* of a sum of money or a house, the *conditio* will not ordinarily apply.[11] Where, however, the gift is in substance of the nature of a provision it is applied more readily.[11] But the distinction between a simple legacy and a gift by way of provision cannot be applied without reference to the circumstances, for a testator may in his own mind have put a pecuniary value on an intended provision and made his gift in terms of money or in the form of a simple legacy, and such circumstances might admit the *conditio*.[1]

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[1] Bell's Prin., ss. 1776, 1867. [2] *Ibid.*; *Grant's Trs.* v. *Grant*, 1862, 24 D. 1211.

[3] *Grant's Trs.*, *supra*, at p. 115, per Lord Pres.

[4] Bell's Prin., s. 1989; Fraser, H. & W. 1371; *Arthur & Seymour* v. *Lamb*, 1870, 8 M. 928; *Hughes* v. *Edwardes*, 1892, 19 R. (H.L.) 33, per Lord Watson.

[5] *Mags. of Montrose* v. *Robertson*, 1738, Mor. 6398; *Crichton's Tr.* v. *Howat*, 1890, 18 R. 260.

[6] *Marquis* v. *Prentice*, 1896, 23 R. 595.

[7] *Wauchope*, 1882, 10 R. 441; *M'Alpine*, 1882, 10 R. 837.

[8] *Halliday*, 1869, 8 M. 112, per Lord Pres. Inglis at p. 115, *vide Crichton's Tr.* v. *Howat*, *supra*.

[9] *Blair's Exrs.* v. *Taylor*, 1876, 3 R. 362, per Lord J.-C. Moncrieff.

[10] E.g. *Halliday*, *supra*; *Bryce's Tr.*, 1878, 5 R. 722.

[11] *Douglas's Exrs.*, 1869, 7 M. 504.

766. Where a bequest is declared to be in lieu of legitim the *conditio* will usually apply,[2] for it is clear that the testator meant it to be a provision.

SECTION 3.—OBJECT OF BEQUEST.

767. The operation of the *conditio* was at first confined to bequests in favour of direct descendants of the testator, including grandchildren [3] and great-grandchildren,[4] for whom the law presumed he would not fail to provide, unless inadvertently.[5] It has not been admitted in the case of illegitimate children even where they are direct descendants of the testator.[6] An extension of its application took place in *M'Kenzie* v. *Holte's Legatees*,[7] where it was applied to bequests in favour of the families of two sisters of the testator's husband and of the family of his niece.

768. In *Wallace* v. *Wallaces* [8] the presumption was applied in favour of a grandnephew of the testator, and, later,[9] in favour of nephews and nieces of the half-blood, whether consanguinean or uterine. In *Christie* v. *Paterson* [10] the *conditio* was held to apply to a bequest in favour of the testator's cousins, but this case has not been followed, and has been disapproved of in succeeding cases,[11] especially in the whole Court case of *Hall* v. *Hall*.[12] In that case the testatrix left her whole estate to brothers and sisters uterine, four of whom predeceased her, one of them leaving a child. It was decided that the *conditio* did not apply in favour of that child, and the opinion was expressed that the application of the *conditio* should not be extended in future.

769. The question whether the presumption arises in cases of relationships through marriage, *e.g.* to bequests by a husband or wife in favour of nephews or nieces of the other spouse, such as are often met with in mutual wills, does not seem to have been expressly considered by the Court. In the case of *M'Kenzie* v. *Holte's Legatees* [7] a lady bequeathed her whole estate to the son and daughter of her trustee, and, failing the son's surviving to take the bequest, £700 thereof equally among the families of her husband's two sisters and the family of his niece.

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[1] *Bryce's Tr.*, 1878, 5 R. 722.

[2] *Wilkie* v. *Jackson*, 1836, 14 S. 1121; *Douglas's Exrs.*, 1869, 7 M. 504, per L. J.-C. Patton.

[3] *Mowbray* v. *Scougall*, 1834, 12 S. 910.

[4] *Grant* v. *Brooke*, 1882, 10 R. 92.

[5] *Greig* v. *Malcolm*, 1835, 13 S. 607, per Lord Corehouse; *Allan* v. *Thomson's Trs.*, 1908 S.C. 483, per Lord Stormonth Darling.

[6] *Farquharson* v. *Kelly*, 1900, 2 F. 863; *Earl of Lauderdale* v. *Boyle's Exrs.*, 1830, 8 S. 771; *Martin's Trs.* v. *Milliken*, 1864, 3 M. 326.

[7] 1781, Mor. 6602.

[8] 1807, Mor. *voce* "Clause," App. 6.

[9] *Thomson's Trs.* v. *Robb*, 1851, 13 D. 1326; *Nicol* v. *Nicol's Exrs.*, 1876, 3 R. 374.

[10] 1822, 1 S. 543.

[11] *Rhind's Trs.* v. *Leith*, 1866, 5 M. 104; *Blair's Exrs.* v. *Taylor*, 1876, 3 R. 362.

[12] 1891, 18 R. 690; vide *Fleming*, 1798, Mor. 8111.

The trustee's son having failed to take, the Court held that the issue of these families were entitled to share in the bequest; but neither in the report of the case nor in the written arguments contained in the Session Papers relating to the case does it appear that the question was debated whether the *conditio* could apply where the relationship existed through marriage only and not by blood.

SECTION 4.—THE PARENT MUST BE INSTITUTED.

770. It is essential to the application of the *conditio* that the parent shall have been effectually instituted. If, therefore, the parent of a child claiming the benefit of the *conditio* has died before the date of the will, *e.g.* where he is a predeceasing member of a class which has been instituted, or if the provision could never have vested in the parent even although he survived the date of the will,[1] his children cannot take through him.[2] The disability exists whether the person was instituted individually or as a member of a class.[3] Where a parent has, by the acceptance of a special provision, debarred himself from being an institute with regard to other provisions, *e.g.* residue, his children cannot claim these other provisions under the *conditio.*[4] This rule applies both where the bequest is to descendants and where the testator is only *in loco parentis* [5] to the institute.[6] Where the testator is presumably unaware of the predecease of the institute, particularly where he calls him *nominatim*, there seems as much reason for applying the *conditio* as there is when the institute survives the execution of the deed, but predeceases the testator.[7]

771. Where a bequest is to "heirs" or "executors" the *conditio* does not apply, even though these institutes should happen to be descendants, nephews, or nieces, of the testator.[8]

772. The case of a trust settlement is in no way more favourable to the application of the principle than the case of a simple testamentary conveyance.[9] It is not essential to the applicability of the *conditio* that there should be in the settlement either a conditional institution or a substitution to the institute; [10] nor that, where the testator is aware that the institute has issue alive at the date of the settlement, he should mention them.[10] Knowledge on the part of the testator of the death of the institute, leaving issue, does not *per se* exclude the implication of the *conditio*, notwithstanding that he had the opportunity of altering his settlement.[1] It is doubtful whether it applies in the case of successive liferents.[2]

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[1] *Rhind's Trs.* v. *Leith*, 1866, 5 M. 104; *Morrison's Trs.* v. *Macdonald*, 1890, 18 R. 181; *Low's Trs.* v. *Whitworth*, 1892, 19 R. 431; *Downie's Trs.*, 1901, 38 S.L.R. 755.

[2] *Dixon's Trs.* v. *Duneher*, 1918 S.C. 90.

[3] *Low's Trs.* v. *Whitworth*, *supra.*

[4] *M'Dougall's Trs.* v. *Heinemann*, 1918 S.C. (H.L.) 6.

[5] *Infra*, par. 774.

[6] *Wishart* v. *Grant*, 1763, Mor. 2310; *Sturrock* v. *Binny*, 1843, 6 D. 117, and cases in note 1, *supra.*

[7] *Rhind's Trs.*, *supra*, per Lord Cowan at pp. 108, 110.

[8] *Black* v. *Valentine*, 1844, 6 D. 689; *Cockburn's Trs.* v. *Dundas*, 1864, 2 M. 1185.

[9] Per Lord Pres. Inglis in *Halliday*, 1869, 8 M. 112.

[10] *Dixon* v. *Dixon*, 1841, 2 Rob. App. 1.

Section 5.—Bequests to Conditional Institutes.

773. It was for a long time doubtful whether the presumption was applicable in bequests to persons called as conditional institutes and not as original legatees;[3] but later decisions have established its applicability in such cases,[4] even where the bequest is in favour of a class and the survivors thereof.[5] Thus in *Greig's Trs.* v. *Simpson*[4] the children of the testator's sister and the survivors of them were called conditionally, yet the child of a sister's child who predeceased the testator was held entitled to take in virtue of the *conditio*.

Section 6.—Bequests by Persons in loco parentis.

774. In the application of the *conditio* to bequests in favour of persons other than descendants of the testator an important distinction has been drawn, viz. that the rule can apply only where he has placed himself *in loco parentis* of the legatee. In *Bogie's Trs.* v. *Christie*,[6] Lord President Inglis said: "Certainly it is quite settled by a long series of decisions that the *conditio* is, as a general rule, applicable to cases of settlements made by an uncle or aunt on nephews or nieces. It is said, however, that that rule is subject to this proviso, that the uncle or aunt must have placed him or herself *in loco parentis* to the children, and I assume that that proposition to a certain extent is a qualification of the rule. But it is necessary to consider what is meant by placing themselves *in loco parentis*. It does not mean that the uncle has during his life occupied such a position, or treated his nephews and nieces with that kindness which a parent would shew to his children; what is meant is, that in his settlement he has placed himself in a position like that of a parent towards the legatees—that is to say, that he has made a settlement in their favour similar to what a parent might have been presumed to make."

This statement of the law, agreeing as it does with prior decisions of the Court, would appear to lay upon claimants not in the direct line of descent from the testator the burden of establishing the testator's intention of making a settlement in their favour similar to what a parent might have been presumed to make. If this onus could be discharged simply by shewing that the settlement contained nothing to indicate that the testator in making the bequest was moved by personal predilection towards the beneficiary, the application of the rule would appear to be more easy; but it is doubtful if, as the law stood, the view taken in *Waddell's Trs.* v. *Waddell*[1] was correct: that a mere bequest to nephews or nieces admits the *conditio* unless the terms of the settlement are such as to shew that the testator meant to exclude their issue from his bounty. In that case Lord M'Laren said: "I cannot help thinking that the true rule, and the only workable rule, is that in the case of a testator who has no children of his own, the benefit of the *conditio* will be given to the issue of his legatees, being nephews or nieces, unless it appear from the will itself that the nature of the bequest was personal favour to the legatee rather than relationship." This decision seems to carry the application of the *conditio* farther than the earlier decisions do.[2]

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[1] *Booth* v. *Blacks*, 1831, 9 S. 406; and 1833, 6 W. & S. 175.

[2] *Tullochs* v. *Welsh*, 1838, 1 D. 94.

[3] *Carter's Trs.* v. *Carter*, 1892, 19 R. 408.

[4] *Greig's Trs.* v. *Simpson*, 1918 S.C. 321; *Blair's Trs.* v. *Taylor*, 1876, 3 R. 362; *Campbell's Trs.* v. *Dick*, 1915 S.C. 100.

[5] *Supra.* Cf. *Macdonald's Trs.* v. *Gordon*, 1909, 2 S.L.T. 321.

[6] 1882, 9 R. 453. Vide *Hall* v. *Hall*, 1891, 18 R. 690; *Johnstone's Exrs.* v. *Johnstone*, 1902, 10 S.L.T. 42.

SECTION 7.—EXCLUDED BY DELECTUS PERSONÆ.

775. Where *delectus personæ* is expressed or can be inferred reasonably from the terms of the settlement, the *conditio* does not operate.[3] Thus where legacies were bequeathed "as mementos of me," the gifts were regarded as personal to the actual institutes.[4] The same result may follow where the testator has in another part of his will or in a subsequent codicil[5] or in a previous marriage contract[6] made provision for the issue of a legatee; but the provision must be substantial or, if not substantial, must be given in such circumstances as will shew that the issue were not intended to take more.[7]

776. The inclusion of one member of a class and the non-inclusion of others may or may not be, according to circumstances, of importance in considering whether there has been *delectus personæ*.[8] Where the bequest is in favour of all the testator's children, or all his nephews or nieces, without words clearly indicative of personal favour to the particular individuals forming the class, the presumption is readily admissible.[9] The naming of the individuals forming a class points, *prima facie*, to *delectus personæ* and the inapplicability of the *conditio*, but the circumstance is not by itself conclusive;[10] and the presumption may hold although persons outside the class are called.[1] Where there are gifts of specific sums, especially, but not always,[2] when the gifts are of different amounts, to the members of a class, the presumption of conditional institution will usually be excluded.[3] The addition of a survivorship clause to the institution of legatees is immaterial,[4] as is also the grant to the institute of a power of disposal by will.[5] Wherever it can be shewn that the testator has not overlooked the possibility of issue existing the presumption is out of place. Thus if issue of legatees are called in one bequest and not in another,[6] or if an independent provision is made in the will for children in circumstances where the *conditio* applies, it will be excluded from other legacies to their parents.[7]

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[1] 1896, 24 R. 189, *vide* per Lords M'Laren and Kinnear; and see *Gauld's Trs.* v. *Duncan*, 1877, 4 R. 691, per Lord Ormidale; *Farquharson* v. *Kelly*, 1900, 2 F. 863, per Lord Pres. Kinross.

[2] *In Johnstone's Exrs.* v. *Johnstone*, 1902, 10 S.L.T. 42, Lord Low held himself bound by the earlier authorities; but in *Hamilton* v. *Hamilton's Trs.*, 1902, 10 S.L.T. 463, Lord Kincairney followed the views expressed in *Waddell's Trs.*

[3] *Hamilton* v. *Hamilton*, 1838, 16 S. 478, per Lord Medwyn; *Fleming*, 1798, Mor. 8111; *Gillespie* v. *Mercer*, 1876, 3 R. 561.

[4] *Allan* v. *Thomson's Trs.*, 1893, 20 R. 733.

[5] *Douglas's Exrs.*, 1869, 7 M. 504.

[6] *Ibid.*; *M'Nab* v. *Brown's Trs.*, 1926 S.C. 387.

[7] *Forrester's Trs.* v. *Forrester*, 1894, 21 R. 971, per Lord M'Laren; *Bryce's Tr.*, 1878, 5 R. 722.

[8] *Bogie's Trs.* v. *Christie*, 1882, 9 R. 453, per Lord Pres. Inglis and Lord Shand; *Macgown's Trs.* v. *Robertson*, 1869, 8 M. 356; *Keith's Trs.* v. *Keith*, 1908, 16 S.L.T. 390.

[9] *Blair's Exrs.* v. *Taylor*, 1876, 3 R. 362.

[10] *Allan* v. *Thomson's Trs.*, 1893, 20 R. 733; 1908 S.C. 483—where all the legatees forming a class were named.

777. It is not *per se* an exception to the admission of the presumption that the original bequest is in express words restricted to members of a class who may be alive at a certain date.[8] Nor is the *conditio* excluded merely by the fact that the legatees are called *nominatim* and not by a class name, at least if *de facto* they form a class.[9]

SECTION 8.—DISTRIBUTION OF BEQUEST WHERE CONDITIO ADMITTED.

778. As the implied conditional institute does not take in terms of the settlement, it is obvious that the character of the bequest, as heritable or moveable at the date when the *conditio* took effect, must determine its distribution when more than one implied conditional institute exists. If the bequest is moveable at that date, whether actually moveable or moveable by conversion actual or implied, the bequest will be divided equally among those benefiting by the *conditio*. If heritable in character, actually or constructively, at the same date, it will pass to the heir-at-law of the original legatee. If the bequest is mixed residue, the division will be equal.[10] Where there was no gift over and where it was not covered by a residuary bequest in the settlement, the rules of intestacy will regulate the distribution.[11]

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[1] *Allan* v. *Thomson's Trs.*, 1893, 20 R. 733; *Nicol* v. *Nicol's Exr.*, 1876, 3 R. 374; *Bryce's Tr.*, 1878, 5 R. 722; but see *M'Call* v. *Dennistoun*, 1871, 10 M. 281; *Chancellor* v. *Mosman*, 1872, 10 M. 965; *Keith's Trs.* v. *Keith*, 1908, 16 S.L.T. 390.

[2] *Bryce's Tr.*, *supra*; *Roughhead*, 1794, Mor. 6403; *Crawford's Trs*, 1886, 23 S.L.R. 787; *Keith's Trs.*, *supra*.

[3] *M'Call* v. *Dennistoun*, 1871, 10 M. 281; *Crichton's Tr.* v. *Howat's Tutor*, 1890, 18 R. 260.

[4] *Grant* v. *Brooke*, 1882, 10 R. 92; *Gauld's Trs.* v. *Duncan*, 1877, 4 R. 691.

[5] *Hughes* v. *Edwards*, 1892, 19 R. (H.L.) 33.

[6] *Dixon* v. *Dixon*, 1841, 2 Rob. App. 1; *Greig* v. *Malcolm*, 1835, 13 S. 607; *Berwick's Exr.*, 1885, 12 R. 565; *Wilkie* v. *Jackson*, 1836, 14 S. 1121.

[7] *Douglas' Exrs.*, 1869, 7 M. 504.

[8] *Gauld's Trs.* v. *Duncan*, 1877, 4 R. 691; *Aitken's Trs.* v. *Wright*, 1871, 10 M. 275; *Halliday*, 1869, 8 M. 112; *Crichton's Tr.* v. *Howat's Tutor*, 1890, 18 R. 260.

[9] *Allan* v. *Thomson's Trs.*, 1893, 20 R. 733; 1908 S.C. 483; *Blair's Exrs.* v. *Taylor*, 1876, 3 R. 362; *Forrester's Trs.*, 1894, 21 R. 971; *Bowman* v. *Richter*, 1900, 2 F. 624.

[10] See *Nairn's Trs.* v. *Melville*, 1877, 5 R. 128; *Grant's Trs.* v. *Grant*, 1862, 24 D. 1211.

[11] *Grant's Trs.*, *supra*.

SECTION 9.—ACCRETION.

779. It has been decided, in conformity with the rule applicable to the express conditional institution of issue,[1] that issue are not entitled, in virtue of the implied *conditio*, to participate in a lapsed share, part of which would have accresced to their parent had he survived.[2]

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[1] *Young* v. *Robertson*, 1862, 4 Macq. 337.

[2] *Graham's Trs.* v. *Grahams*, 1868, 6 M. 820 ; *Aitken's Trs.* v. *Wright*, 1871, 10 M. 275 ; *Henderson* v. *Henderson*, 1890, 17 R. 293 ; *Neville* v. *Shepherd*, 1895, 23 R. 351 ; *Farquharson* v. *Kelly*, 1900, 2 F. 863 ; *Bowman* v. *Richter*, 1900, 2 F. 624 ; *Tullochs* v. *Welsh*, 1838, 1 D. 94.

CONDITION.

See CONTRACT; LEGACIES; OBLIGATION; SALE; VESTING IN SUCCESSION.

CONDITIONS IN FEUDAL GRANTS.

See SUPERIOR AND VASSAL.

CONDITIONAL INSTITUTE.

See SUCCESSION.

CONDITIONAL OBLIGATION.

See OBLIGATION.

CONDONATION.

See DIVORCE.

CONFESSION.

See ADMISSIONS AND CONFESSIONS.

CONFIDENT PERSONS.

See BANKRUPTCY.

CONFIDENTIAL COMMUNICATIONS.

TABLE OF CONTENTS.

General 344
Communications between Parties on the same Side of a Cause . . 344
Communications between a Party and Persons in his Employment 345
Communications between a Client and his Legal Adviser 347
Communications made to and by Men of Skill and Business other than Legal Advisers 351
Communications between Spiritual Adviser and Penitent . . . 352
Communications between a Medical Man and his Patient . . . 353
Communications between Husband and Wife 354
Members and Officers of the Houses of Parliament 355
Judges, Jurors, and Arbiters . . . 355
Judges of the Supreme Courts . . 355
Judges of Inferior Courts . . . 355
Jurors 356
Arbiters 356
Communications between and to Public Officials 356

SECTION 1.—GENERAL.

780. On the ground of "public policy" there are certain communications which have the privilege of "confidentiality."[1] A communication so privileged may not be proved in evidence against the party in whose interest the privilege operates; if the communication is in writing it is not in general recoverable in the course of a litigation by means of a specification of documents. The privilege is not the privilege of the witness or haver. If waived by the party in whose favour it would take effect, the witness or haver must depone or produce the document: conversely the witness or haver may not waive the privilege.

SECTION 2.—COMMUNICATIONS BETWEEN PARTIES ON THE SAME SIDE OF A CAUSE.

781. Communications between parties on the same side of a depending cause made *post litem motem* are confidential.[2] And the same principle applies to communications made between counsel and agents of parties engaged on the same side.[3] Where a firm and the individual partners are suing or being sued, correspondence between individual partners and the firm and between partners is in general confidential, though under special circumstances it might be recoverable.[4] But in an action of damages where the pursuer alleged that he had signed a discharge of his claims under essential error he was held to be entitled to recover correspondence between the defender and the latter's insurance company, which had intervened before the action was raised.[1]

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[1] Taylor on Evidence, 11th ed., p. 617, para. 908.

[2] *Rose* v. *Medical Invalid Insurance Society and Ors.*, 1847, 10 D. 156.

[3] *Stein* v. *Marshall*, 1802, Mor. 12443; Mor. App. Proof, 3.

[4] *Tannet, Walker & Co.* v. *Hannay & Sons*, 1873, 11 M. 931, per Lord Pres. Inglis at p. 932; *Pearson* v. *Anderson Bros.*, 1897, 5 S.L.T. 177.

SECTION 3.—COMMUNICATIONS BETWEEN A PARTY AND PERSONS IN HIS EMPLOYMENT.

782. In general the purpose of a specification of documents is to recover writings of the nature of "evidence."[2] It is, however, the practice in Scotland to allow the recovery of certain classes of communications passing between a party to a litigation and those in his employment even although such communications cannot be "evidence."[3] It is of course the rule that documents of the nature of precognitions cannot be recovered. Accordingly master and servant communications made *post litem motam*, *i.e.* after it has become clear that a litigation is in prospect, though no action has been actually raised, cannot be recovered.[4] But it has long been recognised that the mere relationship of master and servant does not *per se* confer the privilege of confidentiality.[5] In cases relating to disputes arising out of the purchase and sale of machinery falling to be erected by the sellers on the purchasers' premises, reports to the sellers by their workmen engaged on the process of erection and test are recoverable.[6] But reports by the servants of the seller of a motor car relating to the period anterior to the sale have been refused.[7] In actions against the persons on whose property building operations have been in progress, where the ground of action is an accident to a third party said to be due to the conduct of these building operations, a call for reports by the contractors executing the work to those employing them is allowed.[8] In shipping cases reports from the master,[9] mate,[10] engineer,[11] or pilot,[12] to the owners, if made *de recenti* of the events to which they refer, are recoverable. But the owners' replies,[13] and communications between the master and pilot, are not.[12] Formerly reports by stationmasters, guards,[1] and drivers and conductors of tramway cars made to their employers after an accident were held to be confidential.[2] But following the principle of the shipping cases,[3] diligence is now granted for the recovery of reports made *de recenti* of an accident by stationmasters or other officials of a railway company,[4] and also of reports made by inspectors, drivers, conductors, or other officials of a tramway company present at an accident,[5] even although such reports may contain a list of witnesses including members of the public present at the time,[6] or bear a heading that they are intended for use in the event of a litigation, provided no litigation was in fact in contemplation when they were made.[7] Where the report consists of two portions, one containing an account of the accident, the other a list of witnesses, both portions of the report are recoverable,[8] as also perhaps lists of witnesses.[9] Reports by private detectives to their employers are not necessarily confidential.[10]

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[1] *Logan* v. *Miller*, 1920, 1 S.L.T. 271.

[2] *Livingstone* v. *Dinwoodie*, 1860, 22 D. 1333.

[3] *Admiralty* v. *Aberdeen Steam Trawling and Fishing Co., Ltd*, 1909 S.C. 335, per Lord Pres. Dunedin at p. 340 ; cf. *The "Solway,"* 1885, 10 P.D. 137.

[4] *Admiralty* v. *Aberdeen Steam Trawling and Fishing Co., Ltd., ubi cit.; Ritchie* v. *Leith Dock Commissioners*, 1902, 10 S.L.T. 394.

[5] *Tannet, Walker & Co.* v. *Hannay & Sons*, 1873, 11 M. 931.

[6] *Tannet, Walker & Co., supra* (steel mill); *Morrison & Mason, Ltd.* v. *Clarkson Bros.*, 1896, 4 S.L.T. 159 (capacity of a pump).

[7] *Northern Garage, Ltd.* v. *North British Motor Mfg. Co., Ltd.*, 1908, 16 S.L.T. 573.

[8] *M'Laren* v. *Caledonian Rly. Co.*, 1893, 1 S.L.T. 42 ; *Macbride* v. *Caledonian Rly. Co.*, 1894, 2 S.L.T. 61 ; *Sutherland* v. *John Ritchie & Co., Ltd*, 1900, 8 S.L.T. 100.

[9] *Scott* v. *Portsoy Harbour Co.*, 1900, 8 S.L.T. 38 ; *Admiralty* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*, 1909 S.C. 335.

[10] *The "Talisman"* v. *The "Tyne,"* 1896, 4 S.L.T. 63 ; *Devlin* v. *Spinelly*, 1906, 14 S.L.T. 9.

[11] *Mackinnon* v. *National S.S. Co.*, 1904, 12 S.L.T. 441.

[12] *Devlin* v. *Spinelly, supra.*

[13] *Mackinnon* v. *National S.S. Co., supra* ; *Devlin* v. *Spinelly, supra.*

783. Where an action on an insurance policy was defended by the company on the plea of "no insurable interest," communications between the defenders' local secretary and the head office prior to the issue of the policy were held to be confidential.[11] But where a policy-holder sought to reduce a policy on the ground of misrepresentation and concealment by the insurance company's officials, he was held entitled to recover communications between local and head offices.[12] So also where an action on a policy was defended on the ground that the assured had misstated her age, the pursuer was allowed to recover the medical reports and the friends' reports made to the company at the time the policy was effected.[13] But an insurance company which defended an action on an accident policy on the ground that death had taken place from natural causes, while being allowed to recover proposals for a policy said to have been refused by another company, was not allowed to recover reports by the doctor or medical referee in connection therewith.[14] Where the pursuers averred that the defenders' manager had made to the defenders a confession that he had conspired with the pursuers' manager that the latter should order from the defenders excessive quantities of goods at exorbitant prices, this document was held to be confidential.[1]

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[1] *Macfarlane* v. *Great North of Scotland Rly. Co.*, 1893, 1 S.L.T. 127; *Stuart* v. *Great North of Scotland Rly. Co.*, 1896, 23 R. 1005.

[2] *Muir* v. *Edinburgh and District Tramways Co., Ltd.*, 1909 S.C. 244.

[3] *Admiralty* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*, 1909 S.C. 335.

[4] *Irvine* v. *Glasgow and South-Western Rly. Co.*, 1913, 2 S.L.T. 452.

[5] *Finlay* v. *Glasgow Corporation*, 1915 S.C. 615.

[6] *Macphee* v. *Glasgow Corporation*, 1915 S.C. 990.

[7] *Whitehill* v. *Glasgow Corporation*, 1915 S.C. 1015.

[8] *M'Culloch* v. *Glasgow Corporation*, 1918 S.C. 155.

[9] *Ross* v. *Glasgow Corporation*, 1919, 2 S.L.T. 209; but see *M'Bride* v. *Lewis*, 1922, S.L.T. 380.

[10] *Macfarlane* v. *Macfarlane*, 1896, 4 S.L.T. 28; *Thomson* v. *Thomson and Another*, 1907, 14 S.L.T. 643.

[11] *Simcock* v. *Scottish Imperial Insurance Co.*, 1901, 9 S.L.T. 234.

[12] *Macdonald* v. *New York Life Insurance Co.*, 1903, 11 S.L.T. 120.

[13] *Elder* v. *English and Scottish Law Life Assurance Co.*, 1881, 19 S.L.R. 195.

[14] *Hope's Trs.* v. *Scottish Accident Insurance Co.*, 1895, 3 S.L.T. 164.

784. In actions directed to the reduction of wills on the ground of incapacity or facility, reports made to the pursuers by doctors employed by them as to the health of the deceased,[2] the contemporaneous notes of doctors who had inspected the deceased during his lifetime,[3] and also reports by doctors of a railway company as to an accident which the deceased had undergone during his life have all been recovered under a specification of documents.[4] And in an action concerning the probable life of an heir of entail, medical reports to an insurance company were held not to be confidential.[5] In a somewhat exceptional case, where one of the questions in issue was the basis upon which certain lands had been acquired many years previously, a diligence was granted for recovery of letters between a railway company's solicitors and arbiters, engineers, and contractors employed by the company.[6]

785. In considering questions that arise in this branch of law it has to be remembered that decisions in England are not necessarily authoritative.[7] The English rule would seem to be that, in general, communications made to an employer in ordinary course are recoverable, but those made with the view to contemplated litigation are not.[8]

SECTION 4.—COMMUNICATIONS BETWEEN A CLIENT AND HIS LEGAL ADVISER.

786. Although the fact of employment does not *per se* confer the privilege of confidentiality on communications passing between the employer and the employed, the nature of the relationship between a legal adviser and his client is such that it is essential to the administration of justice that communications passing between them should enjoy protection. In the main the principle is common to the law of both England and Scotland, though the law may not be identical in all particulars in the two countries. It would appear to be safe to say that the privilege in Scotland is not more extensive than it is in England.[9] The privilege is a legal incident of the relationship and does not depend on any promise of secrecy;[1] but a promise of secrecy will not render privileged any communication which would otherwise not be privileged.[2] It is the privilege of the client, not of the adviser,[3] and the adviser is bound to claim it,[4] unless it be waived by the client.[5]

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[1] *Wm. Whiteley, Ltd.* v. *Dobson, Molle & Co., Ltd.*, 1902, 10 S.L.T. 71.

[2] *Henderson* v. *Hedrich*, 1892, 20 R. 95.

[3] *Fraser* v. *Fraser's Trs.*, 1897, 4 S.L.T. 228.

[4] *Kinloch* v. *Irvine*, 1884, 21 S.L.R. 685.

[5] *M'Donald* v. *M'Donalds*, 1881, 8 R. 357.

[6] *Caledonian Rly. Co.* v. *Symington*, 1913 S.C. 885.

[7] Cf. *Whitehill* v. *Glasgow Corporation*, 1915 S.C. 1015, per Lord Pres. Strathclyde at p. 1020.

[8] Taylor on Evidence, 11th ed., p. 624, para. 918; *MacCorquodale* v. *Bell*, 1876, 45 L.J. C.P. 329; *Friend* v. *London, Chatham and Dover Rly. Co.*, 1877, 2 Ex. Div. 437; *Southwark Water Co.* v. *Quick*, 1878, 3 Q.B.D. 315, per Brett L.J. at p. 320; *Cooper* v. *Metropolitan Board of Works*, 1883, 25 Ch. D. 472.

[9] Cf. *Greenough* v. *Gaskell*, 1833, 1 Myl. & K. 98, per L. C. Eldon at p. 103; *Pearse* v. *Pearse*, 1846, 1 De G. & Sm. 25; *Lawrence* v. *Campbell*, 1859, 4 Drew. 485, per Kindersley V.-C. at p. 490; *Minet* v. *Morgan*, 1873, L.R. 8 Ch. 361, per L. C. Selborne at p. 368, with *Bower* v. *Russel*, 28th May 1810, F.C.; Burnett, 436; Alison, ii. 469; *Kinloch*, 1795, Hume, ii. 350; *Jarvis* v. *Anderson*, 1841, 3 D. 990, per Lords Moncreiff and Medwyn at p. 993.

787. "By a sacred and settled rule of law communications between a party and his legal adviser regarding the subject of a suit depending or threatened are secure from disclosure."[6] In England the privilege extends to all communications passing between a client and the legal adviser professionally employed by him where the communications pass in the course and for the purpose of that employment.[7] There appears to have been some doubt whether in Scotland such communications are privileged when not made with reference to some litigation pending or in contemplation. In some of the cases the ground on which a call for the recovery of documents under a diligence was refused was that the documents were "sufficiently connected" with a depending litigation to render them confidential, which would rather infer that some such connection was essential.[8] The precise question has never been the subject of authoritative decision, but existing practice and the weight of the more recent authority[9] is in favour of the adoption of the English rule. As between solicitor and client the privilege applies to all departments of a solicitor's work.[10] A memorial submitted to counsel with the relative opinion enjoys the same privilege as a communication to or by a solicitor.[11] Where the privilege exists it is perpetual and does not come to an end on the termination of the employment.[12]

788. The privilege is confined to communications between the client, his relations, and his witnesses on the one hand and his legal advisers on the other.[13] In the terms legal advisers are included the clerks of agents and counsel.[14] So also in England it has been held to apply to the case of intermediate agents,[1] local agents,[2] the opinion of foreign counsel obtained *post litem motam*,[3] and communications from an agent sent abroad to collect evidence.[4] Where the communications must of necessity pass from the client to the legal adviser through the medium of a third party, as, *e.g.*, an interpreter,[5] or in certain cases perhaps a messenger,[6] the channel of communication cannot be examined as a witness against his employer. Privileged communications do not lose their confidentiality by being communicated to third parties.[7]

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[1] *Leslie* v. *Grant*, 1760, 5 Br. Supp. 874.

[2] *Bower* v. *Russel*, 28th May 1810, F.C.

[3] *Anderson* v. *Bank of British Columbia*, 1876, 2 Ch. D. 649.

[4] *Proctor* v. *Smiles*, 1886, 55 L.J. Q.B. 527.

[5] *Calcraft* v. *Guest*, [1898] 1 Q.B. 761.

[6] Dickson on Evidence, p. 911, para. 1663; Stair, iv. 43, 9 (S); Erskine, iv. 2, 25; *Hay, Thomson & Blair* v. *Edinburgh and Glasgow Bank*, 1858, 20 D. 701.

[7] Taylor on Evidence, 11th ed. p. 670, para. 913; *Greenough* v. *Gaskell*, 1833, 1 Myl. & K. 98, at p. 103; *Minet* v. *Morgan*, 1873, L.R. 8 Ch. 361, per Selborne L.C. at p. 368.

[8] *Bower* v. *Russel*, 28th May 1810, F.C.; *Lady Bath's Executors* v. *Johnston*, 12th November 1811, F.C., per Lord Pres. Blair, but see Lord Succoth; *Jarvis* v. *Anderson*, 1841, 3 D. 990, per Lords Moncreiff and Medwyn at p. 993.

[9] *Lumsdaine* v. *Balfour*, 1828, 7 S. 7, per Lords Alloway and Pitmilly at p. 10; *M'Cowan* v. *Wright*, 1852, 15 D. 229, per L. J.-C. Hope at pp. 231, 232, and Lord Wood at p. 237; *Munro* v. *Fraser*, 1858, 21 D. 103, per Lord Pres. M'Neill at p. 107.

[10] *Carpmael* v. *Powis*, 1846, 1 Phill. 687.

[11] Bell's Prin., s. 2254; *Thomson's Trs.* v. *Clark*, 1823, 2 S. 262; *Clark* v. *Spence*, 1824, 3 Mur. 450, at p. 455; *Pearse* v. *Pearse*, 1846, 1 De G. & Sm. 25.

[12] *Lady Bath's Exrs.* v. *Johnston*, *supra*; *Hyslop* v. *Staig*, 1816, 1 Mur. 15, at p. 17 (n.); *Wight* v. *Ewing*, 1828, 4 Mor. 584, at p. 587; *Lord Cholmondeley* v. *Lord Clinton*, 1815, 19 Vesey 268; Taylor on Evidence, 11th ed., p. 630, para. 927.

[13] *Leslie* v. *Grant*, 1760, 5 Br. Supp. 874; Alison, ii. 470.

[14] *Kerr* v. *Duke of Roxburgh*, 1822, 3 Mur. 126, at p. 142; *Taylor* v. *Foster*, 1826, 2 Car. & P. 195; *Foote* v. *Hayne*, 1824, 1 Car. & P. 545; *Chant* v. *Brown*, 1852, 9 Hare 790.

789. The privilege, being a right operating in favour of the client, may be waived by him, either expressly or by implication, as where the client calls the adviser as a witness or produces a confidential document.[8] But refusal to waive the privilege raises no adverse presumption.[9]

790. Communications to a lawyer not made professionally are not privileged, as where he is merely consulted as a friend, where he has declined employment,[10] or where the communications are made before the relationship of agent and client commenced or after it terminated.[11] So also if a non-professional person is acting as a law agent there is no privilege,[12] except perhaps in relation to impending criminal proceedings where persons entrust their defence to friends.[13] It has been observed that in such a case it is sufficient that the person to whom the communication is made is acting as a law agent. Another possible exception is where the communication is made to a lawyer in the erroneous belief that he is acting for the person making the communication when in fact he is not;[14] or to a person not a solicitor in the belief that he is such.[15]

791. Where the legal adviser acquires information about his client's affairs not in the course of his employment but from independent sources this is not confidential;[16] he can also be called upon to testify to facts observed by him personally in the course of his employment, but not communicated by his client to him.[1]

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[1] *Bustros* v. *White*, 1876, 1 Q.B.D. 423, per Jessel M.R. at p. 427; *Anderson* v. *Bank of British Columbia*, 1876, 2 Ch. D. 644, per Jessel M.R. at p. 649; but see *Goodall* v. *Little*, 1851, 1 Sim. Ch. Rep. (N.S.) 155.

[2] *Parkins* v. *Hawkshaw*, 1817, 2 Stark. 239; *Goodall* v. *Little, supra.*

[3] *Bunbury* v. *Bunbury*, 1839, 2 Beav. 173.

[4] *Steele* v. *Steele*, 1843, 1 Phill. 471; *Lafone* v. *Falkland Islands Co.*, 1857, 4 K. & J. 34; *Ross* v. *Gibbs*, 1869, L.R. 8 Eq. 522.

[5] *Du Barre* v. *Livette*, 1791, Pea. R. 77.

[6] *Anderson* v. *Bank of British Columbia*, 1876, 2 Ch. D. 644, per Jessel M.R. at p. 649; *Stuart* v. *Miller*, 1836, 14 S. 837, per L. J.-C. Boyle at p. 842; *Hope*, 1845, 2 Broun 465.

[7] *Moores* v. *Moores*, 1899, 7 S.L.T. 252.

[8] *Forteith* v. *Earl of Fife*, 1821, 2 Mur. 463, at p. 467; *Noble* v. *Scott*, 1843, 5 D. 723; Evidence Act, 1852 (15 Vict. c. 27) s. 1.

[9] *Wentworth* v. *Lloyd*, 1864, 10 H.L.C. 589.

[10] Burnett, 435, 436; *Greenough* v. *Gaskell*, 1833, 1 Myl. & K. 98, per L. C. Eldon at p. 103; *H.M. Adv.* v. *Davie*, 1881, 4 Coup. 450.

[11] *Cobden* v. *Kenrick*, 1791, 4 T.R. 431.

[12] *Stuart* v. *Miller*, 1836, 14 S. 837.

[13] *Gavin* v. *Montgomerie*, 1830, 9 S. 213, per Lord Pres. Hope at p. 219; see *Stuart* v. *Miller, supra*, per Lord Medwyn at p. 842; *Hope*, 1845, 2 Broun 465; Macdonald, Crim. Law, p. 459, n. 3.

[14] *Smith* v. *Fell*, 1841, 2 Curt. 667.

[15] *Calley* v. *Richards*, 1854, 19 Beav. 401, at p. 404.

[16] Hume, ii. 350; Burnett, 435, 436; More's Notes, 415; Alison, ii. 469.

792. Where the legal adviser acts for two parties in the same transaction his evidence is available to either in disputes arising out of this transaction.[2]

793. Where the legal adviser is examined as a haver in an action of exhibition, or under a commission and diligence to recover documents, he is bound to answer questions pertinent to the discovery of the documents whenever his client would have been similarly so bound, even though his knowledge may have been derived from his client.[3] But where his knowledge is derived from his client he cannot be called on to answer questions which could not be put to his client.[4] In an action of proving of the tenor the agent or counsel may be asked whether he saw the missing document and what its terms were, but he may not be asked to divulge what he learned at consultation.[5]

794. Where the authority of the agent is in dispute, communications passing between agent and client, even though they may have passed in the course of a litigation, are recoverable to prove the limits of the authority, as for instance to establish a compromise.[6] If the agent be sued as the true *dominus litis* he may be compelled to disclose communications passing between himself and counsel and his ostensible client.[7] And correspondence between agent and client has been recovered to shew that a claim had been intimated to the client, and that the client knew of it.[8]

795. The privilege does not apply where the transactions as to which the communications passed were fraudulent or criminal. In such a case the solicitor is either an innocent instrument or an accomplice.[9] So a conveyancer consulted by a party who purposed fabricating documents is bound to disclose communications made to him provided they do not involve him in a criminal charge, and he may be examined about the preparation of a deed to which his client is alleged to have adhibited forged signatures.[10] And correspondence between agent and client, and also a memorandum of instructions, may be recovered in a challenge of a transaction on the ground of fraud.[11] Where a trustee in bankruptcy attacked a composition contract on the ground that a particular creditor had got a premium in return for his accession, correspondence between the creditor and his agent was held recoverable on the ground that "the objection of confidentiality can have no operation in a question of fraud." [1] So also where arrestments were said to have been fraudulently used, the agent of the arrester was examined as to what had passed between him and his client prior to the arrestments being moved in Court.[2] And advocates can be compelled to give evidence in the expiscation of private fraudulent conveyances.[3] Where a conveyance is impugned under the Act of 1621, c. 18, correspondence between the disponee and his agent relating to the affairs of the bankrupt and as to the payment of the debts due by the bankrupt to the disponee is not confidential.[4] But a consultation with a solicitor held for the purpose of assisting the client so to arrange his affairs as to "evade" taxation is not a "criminal purpose." [5] Of course where the alleged fraud or criminality is in the course of investigation, communications between the party alleged to have committed it and his legal adviser are fully privileged.[6]

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[1] *Crs. of Wamphray* v. *Lord Wamphray*, 1675, Mor. 347; *Earl of Northesk* v. *Cheyn*, 1680, Mor. 353; *Brown* v. *Foster*, 1857, 1 H. & N. 736; *Duke of Roxburghe* v. *Chatto*, 1753, Elch. Witness, No. 37.

[2] *Duke of Hamilton* v. *Hamilton*, 25th May 1819, F.C.; *Kid* v. *Bunyan*, 1842, 5 D. 193; Taylor on Evidence, 11th ed., p. 650, para. 926.

[3] *Betson* v. *Lord Grange*, 1628, Mor. 342; *A. B.*, 1628, Mor. 16663.

[4] *Scott* v. *Lord Napier*, 1637, Mor. 358; *Fisher* v. *Bontine*, 1827, 6 S. 330.

[5] *Crs. of Wamphray* v. *Lord Wamphray*, *supra*.

[6] *Campbell* v. *Campbell*, 1823, 2 S. 139; *Jaffray* v. *Simpson*, 1835, 13 S. 1122; *Kid* v. *Bunyan*, 1842, 5 D. 193.

[7] *Fraser* v. *Malloch*, 1895, 3 S.L.T. 211.

[8] *Anderson* v. *Lord Elgin's Trs.*, 1859, 21 D. 654.

[9] *Duke of Roxburghe* v. *Chatto*, 1753, Elch. Witness, No. 37; *H.M. Adv.* v. *Davie*, 1881, 4 Coup. 450.

[10] Burnett, 436; *M'Leod* v. *M'Leod*, 1744, Mor. 16754; *M'Lean*, 1838, 2 Swin. 183.

[11] *Millar* v. *Small*, 1856, 19 D. 142 (collusive settlement); *Morrison* v. *Somerville*, 1860, 23 D. 232 (fraud).

796. In bankruptcy procedure the question is dealt with by statute.[7] The agent of the bankrupt may be examined and is bound to answer all lawful questions regarding the estate or affairs of the bankrupt. But he is not bound to answer questions which do not relate to the bankrupt's estate.[8]

797. In cases of status, *e.g.* where an action of declarator of marriage is raised after the death of one of the parties, correspondence between that party and his or her law agents relating to the questions in the case is apparently recoverable by diligence.[9]

SECTION 5.—COMMUNICATIONS MADE TO AND BY MEN OF SKILL AND BUSINESS OTHER THAN LEGAL ADVISERS.

798. Attempts have been made from time to time to extend by analogy the privilege attaching to communications between legal adviser and client to communications made to and by other men of business. In so far as they have been based upon the implications created by the contract of employment they have uniformly failed. The privilege does not extend to other men of business but is limited to lawyers, even though the communications may have been made in "the strictest confidence." [10]

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[1] *Inglis* v. *Gardner*, 1843, 5 D. 1029.

[2] *M'Leod* v. *M'Leod*, 1744, Mor. 16734.

[3] *Keith* v. *Purves*, 1684, Mor. 354.

[4] *M'Cowan* v. *Wright*, 1852, 15 D. 229, 494; *Grant* v. *Grant*, 1748, Mor. 949.

[5] *Bullivant* v. *Att.-Gen. for Victoria*, [1901] A.C. 196.

[6] Dickson on Evidence, p. 923, para. 1681.

[7] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), ss. 86 and 87.

[8] *Tod's Tr.* v. *Officer*, 1872, 10 M. 980; *Delvoitted & Co.* v. *Baillie's Tr.*, 1877, 5 R. 143; see also *Paul* v. *Laing*, 1855, 17 D. 457; *A. B.* v. *Binny*, 1858, 20 D. 1058.

[9] *Mackenzie* v. *Mackenzie's Trs.*, 1916, 1 S.L.T. 349.

[10] *Wilson* v. *Rastall*, 1792, 4 T.R. 752, per Kenyon C.J. at pp. 758, 759; *Wheeler* v. *Le Marchant*, 1881, 17 Ch. D. 675, per Jessel M.R. at p. 681.

Accordingly communications with a factor,[1] steward,[2] clerk,[3] or confidential friend[4] are not privileged. Inquiries and answers thereto made to or by a bank regarding the credit of an individual are not confidential,[5] nor are communications between a trade protection society and its members.[6] An accountant is bound to give evidence as to facts ascertained by him in the course of examining the books of a person by whom he has been employed.[7] Communications made to a solicitor who is acting as patent agent are not confidential in so far as they are made to him in the capacity of patent agent.[8] And there is no privilege attaching to communications between a pursuivant who is employed to investigate a pedigree and his employer.[9] Communications with men of business, engineers, etc., may be protected by the rule precluding the recovery of precognitions,[10] but in certain circumstances, as, *e.g.*, in a case relating to the alleged wrongous use of interdict, where the state of mind of one of the parties at a particular juncture was in issue, an expert's report, made during the course of and for the purposes of a litigation, was recovered under a diligence, the question of how far, if at all, it was to be put into process being reserved.[11]

SECTION 6.—COMMUNICATIONS BETWEEN SPIRITUAL ADVISER AND PENITENT.

799. The question whether confessions made to a clergyman are privileged has not been made the subject of express decision in Scotland, and the text writers are not agreed upon the matter.[12] In one case evidence of an answer to a question put by a jail chaplain to a prisoner was not allowed.[13] In a subsequent case the general question of the confidentiality of a confession made by an individual to his spiritual adviser (in this case a Roman Catholic priest) was argued but not decided. In the judgment it was assumed that a confession by a penitent to a clergyman might be confidential, but it was held that the particular question put to the clergyman in this case was one he was bound to answer as the circumstances would not have brought it within the privilege if it exists.[14] Under very special circumstances, a confession made to a jailer who had constituted himself the legal and spiritual adviser of a prisoner, and had been the medium of communication between her and her friends regarding her defence, was held to be privileged; but in this case the fact that the jailer was functioning as an unprofessional legal adviser, or at any rate as a necessary intermediary in the legal preparations for the defence, may have entered into the decision.[1] A confession made to a third party on the advice of a clergyman is not privileged.[2]

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[1] *Mitchell* v. *Beewick*, 1843, 7 D. 382 ; *Earl of Morton* v. *Fleming*, 1921, 1 S.L.T. 205.

[2] *Lord Falmouth* v. *Moss*, 1822, 11 Price 455.

[3] *Webb* v. *Smith*, 1824, 1 Car. & P. 337.

[4] *Wilson* v. *Rastall*, 1792, 4 T.R. 752.

[5] *Foster, Alcock & Co.* v. *Grangemouth Dockyard Co.*, 1886, 26 S.L.R. 713 ; *Loyd* v. *Freshfield*, 1826, 2 Car & P. 325.

[6] *Mathieson* v. *Scottish Trade Protection Society*, 1897, 5 S.L.T. 213.

[7] *Wright* v. *Arthur*, 1831, 10 S. 139.

[8] *Moseley* v. *Victoria Rubber Co.*, 1886, 55 L.T. 482 ; 3 R.P.C. 351.

[9] *Slade* v. *Tucker*, 1880, 14 Ch. D. 824.

[10] *Wark* v. *Bargaddie Coal Co.*, 1859, 3 Macq. 467.

[11] *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1906, 8 F. 731.

[12] Hume, ii. 335, 350 ; Alison, ii. 471, 537, 586 ; Tait, 386, 387 ; Dickson on Evidence, p. 924, para. 1684 ; Macdonald, Crim. Law, 476, 477.

[13] *Ross*, 1859, 3 Irv. 434.

[14] *M'Laughlin* v. *Douglas and Kidston*, 1863, 4 Irv. 273.

800. In England it has been definitely decided that a confession to a clergyman is not privileged.[3] There is some authority for the view that a statement made in a sacramental or quasi-sacramental confession to a clergyman is protected, but certainly anything said or done outside of this is not confidential, whatever the results of the disclosure may be.[4] And it has been held that a clergyman was bound to disclose in an action of divorce the terms of a conversation between himself and the respondent and co-respondent.[5]

SECTION 7.—COMMUNICATIONS BETWEEN A MEDICAL MAN AND HIS PATIENT.

801. Communications made to a medical adviser, even in the strictest professional confidence, are not privileged in the sense that the doctor is not bound or entitled to disclose them when called upon to do so in Court.[6] It is quite true that, if the doctor wrongfully discloses out of Court facts which he has learned or which have been communicated to him under the seal of professional confidence, an action of damages for breach of confidence may lie. But none the less he has no privilege such as is given to a solicitor when called upon to testify.[7] A medical man may be compelled to give evidence that a patient is suffering from venereal disease although he has learned of that fact while treating the patient under a national scheme, the statutory regulations regarding which enjoin absolute secrecy.[8]

802. Where the communication is made by the doctor to or on the instructions of a third party regarding the health of a person whom he has examined, the decision as to the position of such a communication depends on the circumstances of the case. In an action in which the expectancy of life of an heir of entail was in issue, diligence was granted for recovery of medical reports to an insurance company with whom the life was insured, their admissibility in evidence being reserved.[1] Where an action of reduction of a will on the ground of incapacity or facility is brought, the case books, etc., of the doctors who have been in attendance on the deceased may be recovered,[2] as also reports to relatives (who were parties to the case) made by medical men consulted by them during the testator's life; [3] and reports by doctors of a railway company regarding an accident suffered by the deceased prior to the execution of the deed under challenge may also be recovered.[4] Reports by the medical officers of an insurance company regarding a policy-holder have been held not to be confidential where the payment under the policy was being resisted on the ground of misstatement of age,[5] but have been refused where the policy-holder sought to reduce the policy on the ground that it had been fraudulently represented to him that he was being insured as a first-class life when in fact he was only being insured as a second-class life.[6] So also a call for reports by doctors and the medical referee of another insurance company was refused where a company disputed their liability on an accident policy on the ground that death was due to natural causes.[7]

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[1] *Hope*, 1845, 2 Broun 465. See *ante*, para. 788.

[2] *Anderson* v. *Marshall*, 1728, Hume, ii. 335; *R.* v. *Gilham*, 1828, 1 Moo. C.C. 186.

[3] *R.* v. *Gilham*, *supra*; *Wheeler* v. *Le Marchant*, 1881, 17 Ch. D. 675, per Jessel M.R.

[4] *R.* v. *Hay*, 1860, 2 F. & F. 4, per Hill J.; *R.* v. *Griffin*, 1853, 6 Cox C.C. 219, per B. Alderson; *Broad* v. *Pitt*, 1828, 3 Car. & P. 519, per Best C.J.

[5] *Normanshaw* v. *Normanshaw*, 1893, 69 L.T. 468.

[6] Hume, ii. 350; Burnett, 438; Alison, ii. 470; Tait, 387; *R.* v. *Duchess of Kingston*, 1776, 20 St. Tr. 572, 573; *Christian* v. *Kennedy*, 1818, 1 Mur. 419, at p. 424; *A. B.* v. *C. D.*, 1857, 14 D. 177.

[7] *Wheeler* v. *Le Marchant*, 1881, 17 Ch. D. 675, per Jessel M.R.

[8] *Garner* v. *Garner*, 1920, 36 T.L.R. 196.

Section 8.—Communications between Husband and Wife.

803. Communications between husband and wife made during the marriage are privileged; [8] and while by statute the spouses are admissible as witnesses for and against one another, the confidentiality of such communications is not interfered with.[9] In actions of declarator of marriage, letters passing between the parties may be recovered under a diligence.[10] It is probably incompetent to examine third parties as to communications between husband and wife passing in their presence.[11] The privilege subsists after the dissolution of the marriage by death or divorce.[12] The precise limitations of the privilege have never been very definitely formulated.[13] By statute the wife of a bankrupt must give evidence as to his affairs.[14]

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[1] *M'Donald* v. *M'Donald's Trs.*, 1881, 8 R. 357.

[2] *Fraser* v. *Fraser's Trs.*, 1897, 4 S.L.T. 228.

[3] *Henderson* v. *Hedrich*, 1892, 20 R. 95.

[4] *Kinloch* v. *Irvine*, 1884, 21 S.L.R. 685.

[5] *Elder* v. *English and Scottish Law Life Assurance Co.*, 1881, 19 S.L.R. 195.

[6] *Macdonald* v. *New York Life Insurance Co.*, 1903, 11 S.L.T. 120.

[7] *Hope's Trs.* v. *Scottish Accident Insurance Co.*, 1895, 3 S.L.T. 164.

[8] Fraser, H. & W. ii. 1150.

[9] Evidence (Scotland) Act, 1853 (16 Vict. c. 20), s. 3; Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (*d*).

[10] *Walker* v. *Walker*, 1896, 4 S.L.T. 151.

[11] Dickson on Evidence, p. 910, para. 1660.

[12] *Monroe* v. *Twistleton*, 1803, Pea. Ad. Ca. 219; *Aveson* v. *Lord Kinnaird*, 1805, 6 East 188, at p. 192; *O'Connor* v. *Marjoribanks*, 1842, 4 Man. & G. 435.

[13] Taylor on Evidence, 11th ed., pp. 615, 618, paras. 900A and 910, and *Commonwealth* v. *Sapp*, 1890, 29 Am. St. Rep. 405.

[14] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), ss. 86 and 87; *Sawers* v. *Balgarnie*, 1858, 21 D. 153.

Section 9.—Members and Officers of the Houses of Parliament.

804. A member or officer of either House of Parliament, or a shorthand writer employed therein, cannot, without the permission of the House, be forced to disclose what took place within its walls. The Speaker or a member may be called to prove a member's presence at a particular debate, but he cannot, without the permission of the House, give evidence as to the terms of a speech or as to the member's vote.[1]

Section 10.—Judges, Jurors, and Arbiters.

Subsection (1).—*Judges of the Supreme Courts.*

805. Judges, like other persons, are competent witnesses as to matters of fact coming under their observation in Court, as *e.g.*, a riot in Court.[2] But on grounds of public policy there are obvious objections to the examination of a judge of the Supreme Courts as to matters occurring before him judicially as part of a criminal or civil process.[3] There have been, however, cases in which judges of the Supreme Courts have been examined as witnesses, but subject always to the qualification that questions as to the action or opinion of the Court are not allowable.[4] Possibly the evidence of a judge would be more readily allowed where there was *penuria testium*.[5] But a judge has given evidence in a proving of the tenor,[6] and in an action of damages for slander arising out of proceedings in a trial in the Justiciary Court.[7] In England it has been held that a judge of the superior Courts should not be called as a witness to prove facts which may be proved equally well by other persons.[8] The proper course where it is desired to obtain information from an officer of the Court is not to examine him as a witness but to move for a remit to him to report.[9]

Subsection (2).—*Judges of Inferior Courts.*

806. Judges of inferior Courts may be examined on matters which took place before them in their judicial capacity.[10] The law is apparently the same in England.[11]

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[1] *Plunkett* v. *Cobbett*, 1804, 5 Esp. 136, N.P.; *Chubb* v. *Salomons*, 1852, 3 Car. & Kir. 75, N.P.

[2] *Harper* v. *Robinson*, 1821, 2 Mur. 383, at p. 390.

[3] *Harper* v. *Robinson*, *supra*, per Lord Pitmilly at p. 404; *Stewart* v. *Fraser*, 1830, 5 Mur. 166, per Lord Pitmilly at p. 188.

[4] *Harper* v. *Robinson*, *supra*, at p. 393.

[5] *Muckarsie* v. *Wilson*, 24th February 1824, Bell's Notes, 99.

[6] *Calderwood* v. *Courtie*, 1681, Mor. 15800.

[7] *Gibson* v. *Stevenson*, 1822, 3 Mur. 208, at p. 219.

[8] *Florence* v. *Lawson*, 1851, 17 L.T. (O.S.) 260; Taylor on Evidence, 11th ed., p. 638, para. 938.

[9] *Fogo* v. *Colquhoun*, 1867, 6 M. 105.

[10] Dickson on Evidence, p. 900, para. 1638; *Monaghan*, 1844, 2 Broun 131, at p. 136.

[11] *R.* v. *Harvey*, 1858, 8 Cox C.C. 99, per Byles J. at p. 103; *R.* v. *Gazard*, 1838, 8 Car. & P. 595; *Mitchell* v. *Croydon JJ.*, 1914, 30 T.L.R. 526.

SUBSECTION (3).—*Jurors.*

807. The evidence of a juror after discharge is not competent to prove any communings amongst the jury in arriving at their verdict, whether in criminal [1] or civil cases, even though it is alleged that the verdict had been arrived at by casting lots [2] or that the jury had been tampered with.[3] Jurors are, however, competent witnesses as to matters which occurred in course of the trial and which they had an opportunity of observing in common with other persons present.[4] It is not certain whether the jurors could be called as witnesses to establish an essential error by the clerk of Court in recording the verdict.[5]

SUBSECTION (4).—*Arbiters.*

See ARBITRATION, *ante*, Vol. I. para. 1159.

SECTION 11.—COMMUNICATIONS BETWEEN AND TO PUBLIC OFFICIALS.

808. Secrets of state, including in that term all communications between and to public officers in their official capacity, are protected from disclosure, from obvious considerations of public policy. Under this description are comprehended state papers, *e.g.* treaties with foreign powers, and also official communications between the departments of the Executive.[6] The privilege has been held to cover communications between the governor of a colony and his attorney-general [7] or the military officers under his authority,[8] between the East India Company and the Board of Control,[9] and between the Lord Advocate and the Secretary of State regarding a pardon.[10] It has also been applied to communications between a Sheriff and his predecessor regarding the character of a procurator-fiscal,[11] the minutes of investigations of the Board of Excise into charges against one of its officers,[12] the report of a military court of inquiry,[13] communications between the War Office and the District Commands and the records of the War Office and the Commands,[14] the report of a government inspector of schools,[15] the report by a government officer upon a railway accident,[1] the report of the doctor of a lunatic asylum to the Board of Lunacy,[2] the instructions issued by the Inland Revenue to their officers,[3] a police report to a procurator-fiscal,[4] even where neither charge nor prosecution was in contemplation,[5] a report by a policeman to his superiors,[6] communications passing between the Crown Office and a procurator-fiscal,[7] precognitions,[7] and the charge books kept by a procurator-fiscal.[8]

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[1] *M'Gregor*, 1752, Maclaur. Cr. Ca. 149; *Mill* v. *Nicol*, 1767, Maclaur. Cr. Ca. 372; *Hannay*, 1809, Hume, ii. 316.

[2] *Stewart* v. *Fraser*, 1830, 5 Mur. 166.

[3] *M'Whir* v. *Maxwell*, 1836, 15 S. 299.

[4] Dickson on Evidence, p. 902, para. 1645; *R.* v. *Woodfall*, 1770, 5 Burr. 2667.

[5] Dickson on Evidence, p. 902, para. 1646; Hume, ii. 430.

[6] *Beatson* v. *Skene*, 1860, 5 H. & N. 838.

[7] *Wyatt* v. *Gore*, 1816, Holt's N.P. Ca. 299.

[8] *Cooke* v. *Maxwell*, 1817, 2 Starkie 183.

[9] *Smith* v. *East India Co.*, 1841, 1 Phill. C.C. 50.

[10] *Gibson* v. *Stevenson*, 1822, 3 Mur. 208, at p. 220.

[11] *Greig* v. *Edmonstone*, 1826, 4 Mur. 66, at p. 70.

[12] *Young & Co.* v. *Commissioners of Excise*, 27th February 1816, F.C. (rev. on another point, 1822, 1 Sh. App. 179, see per L. C. Eldon at p. 206).

[13] *Home* v. *Bentinck*, 1820, 2 Brod. & Bing. 130.

[14] *Cappon* v. *Lord Advocate*, 1919, 2 S.L.T. 266.

[15] *Sturrock* v. *Greig*, 1849, 12 D. 166.

809. Where the communications pass between a government department and an outsider the position is somewhat different, and the question of their confidentiality depends on the nature of the communications and the circumstances under which they are made. In the first place, where a communication is made at the request of a government department, as, *e.g.*, a reply to questions on the fitness of a candidate for a post, it is confidential.[9] But it may be otherwise where the communication is volunteered. It has been held in England that in a public prosecution it is not in the right of the accused to have the name of the informer disclosed unless in the opinion of the presiding judge such disclosure is necessary to establish the innocence of the accused.[10] The Scots rule appears to be that the Lord Advocate is in general bound to disclose the name of his informer.[11] Similarly if the information is in writing it may be recovered.[12] To this rule there are two recognised classes of exceptions—prosecutions for treason and similar offences against the state, and also offences against the revenue laws.[13] Further, if the Lord Advocate were to declare on his official responsibility that disclosure would be prejudicial to the public interest in a particular case the Court would not allow it to be made.[14] But if there be no reason of state why precognitions should not be produced, the Court may order their production if that be required in order to meet the ends of justice.[15]

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[1] *Gibson* v. *Caledonian Rly. Co.*, 1896, 33 S.L.R. 638.

[2] *Purves* v. *Gilchrist*, 1905, 13 S.L.T. 460.

[3] *Tierney* v. *Ballingall & Son*, 1896, 23 R. 512.

[4] *Hastings* v. *Chalmers*, 1890, 18 R. 244.

[5] *Campbell* v. *Gibson Maitland*, 1893, 1 S.L.T. 127.

[6] *Muir* v. *Edinburgh and District Tramways Co., Ltd.*, 1909 S.C. 244 (first head of specification).

[7] *Arthur* v. *Lindsay*, 1894, 22 R. 417; 1 Adam 582.

[8] *Sheridan* v. *Peel*, 1907 S.C. 577 (not upon the ground of confidentiality, but that the documents would not have been evidence).

[9] *Earl* v. *Vass*, 1822, 1 Sh. App. 229.

[10] *Att.-Gen.* v. *Briant*, 1846, 15 M. & W. 169; *Marks* v. *Beyfus*, 1890, 25 Q.B.D. 494.

[11] Hume, ii. 135; Alison, ii. 94; *Henderson* v. *Robertson*, 1853, 15 D. 292; *Arbuckle* v. *Taylor*, 1815, 3 Dow 160; *Boag* v. *Gillies*, 1832, 5 Deas & And. 434.

[12] Hume, ii. 135, 136; *Steven* v. *Dundas*, 1727, Mor. 7905; *Mills* v. *Kelvin & James White, Ltd.*, 1912 S.C. 995.

[13] *Earl* v. *Vass*, 1822, 1 Sh. App. 229, per L. C. Eldon at p. 237; *Henderson* v. *Robertson*, 1853, 15 D. 292, per L. J.-C. Hope at p. 295.

[14] Hume, ii. 134; Dickson on Evidence, p. 906, para. 1653; *Henderson* v. *Robertson*, *supra*, per Lord Cockburn at p. 296, Lord Rutherford at p. 294; *Leven* v. *Young*, 1818, 1 Mur. 350, at p. 357; *Arthur* v. *Lindsay*, 1894, 22 R. 417; 1 Adam 582; *Earl* v. *Vass*, *ubi. cit.*

[15] *Boag* v. *Gillies, supra*; *Donald* v. *Hart*, 1844, 6 D. 1255; *Mills* v. *Kelvin & James White, Ltd., supra.*

So also communications to the procurator-fiscal were held to be recoverable.[1] On the other hand letters written to the Inland Revenue by an informer, and documents produced by him, were held to be confidential, the Inland Revenue pleading the privilege.[2] An inventory rendered to the Estate Duty Office is confidential.[3] Income tax returns have been applied for,[4] but with one exception [5] refused. In the case where they were allowed the Inland Revenue did not consent but did not oppose the granting of the call. In one of the most recent cases the judges unanimously expressed the view that the Court had, and in appropriate circumstances would exercise, the right to call for such documents in the face of objection by the Inland Revenue.[6] Income tax receipts, being the voucher of the party in whose favour they are granted, may in certain circumstances be recovered, where the income of the recipient is in issue.[7] A call for excerpts, under the Bankers' Books Evidence Act, 1879, from Post Office Savings Bank books has been granted.[8] It has been held in England that this privilege does not extend to the clerk to the Property Tax Commissioners, notwithstanding the terms of his oath.[9] When a call was made for telegrams and postal orders it was refused on the ground that the nature of the call would put an intolerable amount of labour on the Post Office staff. Confidentiality was argued and repelled.[10]

810. The question of confidentiality as a rule arises for decision on a motion for a diligence for the recovery of documents under a specification. Where the litigation is between private persons, the proper course is that the motion for production should be intimated to the department concerned, which will or may attend through counsel and state the departmental view with reference to the particular documents called for. In ordinary practice the statement of counsel upon behalf of the department is treated as sufficient, but, if more formality is called for, an affidavit by someone in a responsible position able to speak for the department is the proper evidence to put before the Court. It is not necessary that this affidavit should be under the hand of the Minister concerned, provided it is by a responsible officer.[11] As far as reported cases go in Scotland, there is no instance in which the Court have overruled the discretion of a government department and ordered the production of a document in the face of a statement by the department concerned that its production would be prejudicial to the public interest. As the department involved is fully aware of the various considerations against the production of the document and the Court have no complete information on the point, it would seem that on the question of prejudice the opinion of the department is final.[1] At the same time it has long been held that the Scots Courts have an inherent power to order the production of a document in the face of an objection by the department concerned based on prejudice to the public interest, if the situation appears to the Court to render that course appropriate.[2] There is no difference in this connection created by the fact that the department in question is a party to the case.[3] If the document is withheld the remedy of the party complaining is by way of comment on its non-production. Where the document relates to a private individual he cannot waive the privilege if the department in whose custody the document is pleads it.[4]

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[1] *Halcrow* v. *Shearer*, 1892, 20 R. 216 ; *Sheridan* v. *Peel*, 1907 S.C. 577, disapp. *Forbes* v. *Gracie*, 1901, 9 S.L.T. 217.

[2] *Brown* v. *Hay*, 1897, 5 S.L.T. 149.

[3] *Forrest* v. *Macgregor*, 1913, 1 S.L.T. 372.

[4] *Shaw* v. *Kay*, 1904, 12 S.L.T. 495 ; *Henderson* v. *M'Gown*, 1916 S.C. 821.

[5] *Wilson's Exrs.* v. *Bank of England*, 1925, S.L.T. 81.

[6] *Henderson* v. *M'Gown*, *supra*; cf. *Donald* v. *Hart*, 1844, 6 D. 1255 ; *Arthur* v. *Lindsay*, 1894, 22 R. 417 ; 1 Adam 582.

[7] *Craig* v. *North British Rly. Co.*, 1888, 15 R. 808 (refused) ; *Christie* v. *Craig*, 1900, 2 F. 1287 (refused) ; *Gray* v. *Wyllie*, 1904, 6 F. 448 (refused) ; *Kerr* v. *Outram*, 1913, 2 S.L.T. 165 (refused) ; *Johnston* v. *Caledonian Rly. Co.*, 1892, 20 R. 222 (granted) ; *Macdonald* v. *Hedderwick & Co.*, 1901, 3 F. 671 (granted) ; *Stroyan* v. *M'Whirter*, 1901, 9 S.L.T. 242 (granted) ; *Robertson* v. *Hamilton*, 1915, 2 S.L.T. 195 (granted).

[8] *Forrest* v. *Macgregor*, *supra*.

[9] *Lee* v. *Birrell*, 1813, 3 Camp. 337.

[10] *Somervell* v. *Somervell*, 1900, 8 S.L.T. 112.

[11] *Admiralty* v. *Aberdeen Steam Trawling and Fishing Co.*, 1909 S.C. 335, per Lord Pres. Dunedin at p. 341 ; cf. *Beatson* v. *Skene*, 1860, 5 H. & N. 838 ; *Re Joseph Hargreaves, Ltd.*, [1900] 1 Ch. 347.

811. As the ground of the privilege is public policy, it has been held in England that the Court will intervene to prevent the production of a document of state even where the objection is not taken.[5] For similar reasons secondary evidence of a privileged document has been held to be inadmissible.[6] A document is not to be treated as inaccessible so as to let in secondary evidence of its contents merely because the Crown Office have declined to produce it on application being made by letter. The proper course is to move for a diligence, when the question will be considered.[7]

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[1] *Admiralty* v. *Aberdeen Steam Trawling and Fishing Co.*, 1909 S.C. 335, and per Lord Kinnear at p. 343; *Henderson* v. *M'Gown*, 1916 S.C. 821, per Lord Pres. Strathclyde at p. 825.

[2] *Donald* v. *Hart*, 1844, 6 D. 1255, per L. J.-C. Hope at p. 1256; *Arthur* v. *Lindsay*, 22 R. 417, per Lord M'Laren at p. 421; *Sheridan* v. *Peel*, 1907 S.C. 577, per Lord Pres. Dunedin at p. 580; *Henderson* v. *M'Gown, supra*. For the English law see *Re Joseph Hargreaves, Ltd.*, [1900] 1 Ch. 347; *Hughes* v. *Vargas*, 1893, 9 T.L.R. 551; *Att.-Gen.* v. *Nottingham Corporation*, 1904, 90 L.T. 308; *Williams* v. *Star Newspaper Co.*, 1908, 24 T.L.R. 297; *Asiatic Petroleum Co.* v. *Anglo-Persian Oil Co.*, [1916] 1 K.B. 882.

[3] *Admiralty* v. *Aberdeen Steam Trawling and Fishing Co.*, 1909 S.C. 335, per Lord Pres. Dunedin at p. 341.

[4] *Anthony* v. *Anthony*, 1919, 35 T.L.R. 559.

[5] *Chatterton* v. *Secretary of State for India in Council*, [1895] 2 Q.B. 189, per Kay L.J. at p. 194; cf. *Little* v. *Smith*, 1845, 8 D. 265; 1846, 9 D. 737; *Sturrock* v. *Greig*, 1849, 12 D. 166.

[6] *Chatterton* v. *Secretary of State for India in Council, supra*; Dickson on Evidence, p. 908, para. 1657.

[7] *Dowgray* v. *Gilmour*, 1907 S.C. 715.

CONFIRMATION.

See COMPLETION OF TITLE.

CONFIRMATION OF EXECUTORS.

TABLE OF CONTENTS.

	PAGE
Introduction	360
Jurisdiction	361
In General	361
Domicile	361
Proof of Holograph Wills	363
Who may practise in Commissary Courts	363
Confirmation of Executors-Nominate	363
Nature of Office of Executor-Nominate	363
Executors expressly appointed	364
Implied Appointment	364
The Executors Act, 1900	364
Assumed and Nominated Trustees	366
Specialties of Appointment	366
Confirmation of Executors-Dative	367
When necessary	367
Who are entitled to be appointed	367
Contents of Inventory and Confirmation	368
Estate to be included	368
Valuation of Estate	369
Extent of Title obtained	369
The Oath	370
Before Whom to be taken	370
By Whom to be taken	370
Contents of Oath	371
Debts and Funeral Expenses	371
Caution for Executors-Dative	372
General Rules	372
Restriction of Caution	373
Who may be Cautioner	374
Small Estates	374
General	374
Ascertainment of Amount of Estate	375
£300 Limit under Inland Revenue Act, 1881	375
Procedure	376
Additional Inventories and Confirmations	376
Additional Inventories	376
Additional Confirmations	376
Confirmation *ad omissa vel male appretiata*	376
Confirmation *ad non executa*	377
Corrective Inventories	377
Resealing of Scottish Confirmations	377
Introductory	377
Resealing in England	377
Resealing in Northern Ireland	378
Resealing in the Irish Free State	378
Resealing in Scotland of English and Irish Grants	378
English Grants	378
Northern Irish Grants	379
Irish Free State Grants	379
Dominion Grants	379
Title without Confirmation	380
Preliminary	380
Power of Executors unconfirmed	380
Substitutes for Confirmation	380
Privileged Estates	381
The Transmission of Trust Funds	381
Common Law Methods	381
Statutory Methods	382
Executors (Scotland) Act, 1900, s. 6	382
English and Irish Estates	383
Executors (Scotland) Act, 1900, s. 7	383
Trusts Act, 1921	383
Confirmation as Executor-Creditor	384
Special Features	384
How excluded	384
Equalisation of Creditors	384
Creditors of the Next-of-kin	385

SECTION 1.—INTRODUCTION.

812. Confirmation is the ratification by a competent Court of an appointment of executors, made either by the deceased or by the Court, and confers a title to uplift, administer, and dispose of the personal

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NOTE.—Cases cited with date but no reference are to be found in the records which have been preserved by the Commissary Clerks in the Commissariot of Edinburgh, and which are available by the courtesy of the officials.

estate of the deceased contained in an inventory given up by the executors, upon which the confirmation proceeds. When the appointment of executor has been made by the deceased, the appointee is an executor-nominate, and the confirmation is a testament testamentar. When the appointment has been made by the Court (usually, but not always, in intestate cases), the appointment is a decree-dative, the appointee an executor-dative, and the confirmation a testament-dative. An executor-nominate corresponds to an executor in England, and a testament testamentar (so far) to probate. An executor-dative corresponds to an administrator in England, and a testament-dative to letters of administration or, in testate cases, to letters of administration with the will annexed.

813. By the Sheriff Courts Act, 1876,[1] s. 35, the Commissary Courts were abolished, and their jurisdiction was transferred to the Sheriffs, but it was provided that it should still be competent and proper to affix the seal of office of a Commissariot to all documents to which it would have been competent and proper to affix it before the Act.

Section 2.—Jurisdiction.

Subsection (1).—*In General.*

814. Commissary jurisdiction is of an administrative and tentative nature. "The effect of confirmation is merely to give a title to the executors to administer the estate of the deceased, and they are liable to an action . . . to have the deed set aside. . . . The practice is to give confirmation subject to any challenge of the will at a future time." [2] This marks the fundamental difference between Scottish confirmation and English probate. In commissary procedure findings beyond its own limited jurisdiction are to be avoided, *e.g.* findings that a mutual will was irrevocable and that an attempt at revocation was inept.[3] In *Martin's* case Lord President Robertson said that "the duty of the Sheriff as Commissary is to determine who is entitled to the office of executor on the face either of the deeds which are put before the Court or of the relation to the deceased which is set out as the title of the applicant."

Subsection (2).—*Domicile.*

815. Two other matters of a somewhat similar nature may be here mentioned regarding commissary jurisdiction. The one has reference to the ascertainment of domicile, and the other to the proof of holograph wills. In regard to domicile, it is to be kept in view that the great bulk of commissary business is administrative and non-contentious. Disputed cases usually go straight to the law courts, and not by way of appeal from the commissary side, and the administrative aspect is left in suspense or treated by the universal Scottish solvent of the appointment of a judicial factor. This distinction between contentious and administrative business has direct application to the subject of the domicile of the deceased. For the administrative purpose of confirmation the last place of habitual residence is, *prima facie*, taken to be the domicile, while in contentious cases the investigation begins at the other end with the domicile of origin.[1]

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[1] 39 & 40 Vict. c. 70.

[2] *Hamilton* v. *Hardie*, 1888, 16 R. 192, per Lord Shand.

[3] *Martin* v. *Ferguson's Trs.*, 1892, 19 R. 474; *MacHardy* v. *Steele*, 1902, 4 F. 765.

816. Special provisions as to domicile in connection with commissary and probate practice were contained in the Confirmation and Probate Act, 1858,[2] and the Sheriff Court Act, 1876. By s. 9 of the former Act, it was made competent to include in the inventory of any person dying domiciled in Scotland personal estate in England and Ireland, but the Commissary required to find by interlocutor that the deceased died domiciled in Scotland, which interlocutor should be "conclusive evidence of domicile"; but by s. 17 of the same Act this was to be so "for the purposes of this Act only." The Act of 1876 simplified the procedure, providing that the oath should specify a Scottish domicile, and thereupon the Clerk is entitled to insert in the confirmation, or to note thereon and sign, a statement of Scottish domicile, but only to the limited effect above mentioned. There is also the minor matter of county domicile. That regulates the Court in which the confirmation must proceed, for the Commissariot of Edinburgh is not a common alternative forum as is the Sheriff Court of Chancery in services. But when the deceased had resided and died abroad, it often happens that it can be deponed that he died without any fixed domicile except that it was in Scotland, and all such cases go to the Edinburgh Commissary Court.

817. In a wider aspect the right to confirmation is regulated by the law of the deceased's domicile. This is in accordance with the principle of private international law that personal property follows the person, so that the parties entitled to its administration and to share in its beneficial distribution on the owner's death are determined by the law of his domicile. But the administrative title must be granted by the Courts, and in accordance with the judicial forms, of the country in which the estate is situated and the debtors reside. No judicial title can of its own force affect estate not within the jurisdiction of the Court which grants it. If the Courts of a foreign domicile have granted a title of administration, an ancillary title must be obtained in Scotland to Scottish assets.

818. It is not, however, necessary that the person entitled by the law of the domicile should have had his title recognised in the country of the domicile as a condition precedent to the title being acted on here as a basis of confirmation. There may be no personal, or any, estate in the country of domicile, or none to which an administrative title is required, and yet there may be personal estate in Scotland to which a Scottish title is required. Yet in any case confirmation is granted to the person whom the Courts of the deceased's domicile either have appointed, or would recognise as entitled, to realise estate within their own jurisdiction. This was laid down with great clearness by Lord President Inglis, as applying both to executors-nominate and executors-dative.[1]

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[1] See M'Laren, Wills and Succession, 3rd ed., p. 6.

[2] 21 & 22 Vict. c. 56.

Section 3.—Proof of Holograph Wills.

819. On the question of the proof of holograph wills it is enough to refer to the case of *Cranston*,[2] which recognised the rule that, if such a will contains an assertion that it is written by the testator, it is *ex facie* valid without witnesses or proof. Lord M'Laren held that that rule had no application except to the matter there in hand, namely, "the non-contentious business of the Commissary Courts . . . and, judging from expressions of opinion which we have heard, I should imagine that it has not many friends outside that ancient jurisdiction."

Section 4.—Who may practise in Commissary Courts.

820. The agents entitled to practise in commissary causes, where application by initial writ is necessary, are the law agents enrolled in the Sheriff Court of the county. An Act of Sederunt of 15th January 1890 provides that an executor or any qualified law agent may send an inventory of personal estate, with the relative writs, to any Commissary or Sheriff Clerk for registration in the books of his Court, and the Clerk shall receive and record the same and transmit the confirmation and return the writs by post, on payment of the fees. The Act is not to affect the procedure with reference to petitions (now initial writs) in executry causes, which means that initial writs can be received only when signed, and presented personally, either by the parties or by a practitioner in the particular court.

Section 5.—Confirmation of Executors-Nominate.

Subsection (1).—*Nature of Office of Executor-Nominate.*

821. The person who, in preference to all others, is entitled to confirmation is the executor nominated by the deceased. Originally the office of executor-nominate was a beneficial appointment, but by the Intestate Moveable Succession Act, 1855,[3] the right of the executor-nominate, as such, to retain any part of the estate for his own use was abolished. An executor-nominate is now, therefore, simply a testamentary administrator for all interested in the personal succession. Under the Trusts (Scotland) Act, 1921[4] (s. 2), any executor-nominate is a trustee. The appointment of executor may be—(1) express; (2)

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[1] *Goetze* v. *Aders*, 1874, 2 R. 150; *Marchioness of Hastings* v. *Marquis of Hastings' Exrs.*, 1852, 14 D. 489.

[2] *Cranston, Petr.*, 1890, 17 R. 410.

[3] 18 & 19 Vict. c. 23.

[4] 11 & 12 Geo. V. c. 58.

implied; (3) by construction under s. 3 of the Executors (Scotland) Act, 1900; (4) by assumption, or by appointment by the Court, as trustee.

SUBSECTION (2).—*Executors expressly appointed.*

822. The most common form is: "I appoint A. B. to be my executor," or "I appoint my said trustees to be my executors." A statement such as "the same trustees as my brother John," being a reference to the will of a predeceasing brother, without any names being given, is a good appointment.[1] The power of appointment may be delegated. Of this the records of the Edinburgh Commissariot shew many examples.[2]

SUBSECTION (3).—*Implied Appointment.*

823. Until about a hundred years ago the practice was to refuse confirmation unless the appointment contained the word "executor." But that was condemned in an unreported case in the Court of Session,[3] since which it has been the practice to confirm as executor-nominate any person upon whom, directly or by implication, executorial powers have been conferred.[4] As apparently to the contrary effect there may be cited a case in which there was a legacy to "my executor Mr T."; confirmation was refused to him in competition with the next-of-kin, who had also an interest under the will; but the case was a special one, and it has not been uniformly followed in practice. Even before the Executors Act, 1900, general testamentary trustees were regarded as conclusively executors-nominate if a contrary intention did not appear. In *Denman's* case [5] Lord Kinnear laid it down that, in cases of competition for the office, the Court has no concern with the comparative capacity of the claimants to administer the estate. If a widow who is named as executrix has it in contemplation to claim legal rights, she is not put to an election between her administrative office and her legal claim; but if and when a conflict of interests arises, the result may be that, without removing her from office, the estate will be placed under the charge of a judicial factor.[6]

SUBSECTION (4).—*The Executors Act*, 1900.

824. The Executors (Scotland) Act, 1900,[7] sanctioned the previously existing practice of granting confirmation to testamentary trustees though not in terms appointed to be executors, and extended still further the right to confirmation as executor-nominate. Sec. 3 provides:—

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[1] *Martin* v. *Ferguson's Trs.*, 1892, 19 R. 474.

[2] *Hinds*, 11th Mar. 1859; *Parker*, 10th Nov. 1881; *MacGregor*, 6th Sept. 1900.

[3] *Ross*, 9th Mar. 1833.

[4] *Dundas* v. *Dundas*, 1837, 15 S. 427; *Tod*, 1890, 18 R. 152; *Martin, supra.*

[5] *Denman* v. *Torry*, 1899, 1 F. 881.

[6] *Smart* v. *Smart*, 1926 S.C. 392.

[7] 63 & 64 Vict. c. 55.

When a testator has not appointed any person to act as his executor, or failing any person so appointed, the testamentary trustees of such testator, original or assumed, or appointed by the Supreme Court (if any), failing whom any general disponee or universal legatory or residuary legatee appointed by such testator, shall be held to be his executor-nominate and entitled to confirmation in that character.

825. There is happily a dearth of reported cases on the operation of this enactment. As regards the words "or failing any person so appointed," the failure may be by predecease, declinature, incapacity, or subsequent death, in which last case the confirmation may be *ad non executa*.[1] The records of the Edinburgh Commissary Court shew many instances in which the section has been applied, *e.g.* a bequest of "house with contents and also all moneys"; [2] "all that belongs to me in money and all others"; [3] "sole heiress"; [4] "anything either money or property left at my wife's death"; [5] "all to my daughters." [6] In this connection it is useful to have a note also of non-commissary decisions on the question of what words do, or may, amount to a gift of the whole or residuary personal estate: "belongings" and "possessions"; [7] "whole means and effects"; [8] "means and substance"; [9] "money" or "moneys"; [10] "whatever more money I leave"; [11] "bequest of personal estate to A." to be used by him for the term of his natural life; with no trust and no further disposal.[12]

826. There is a strong indication of opinion that s. 3 of the 1900 Act does not apply to a liferenter.[13] In the Edinburgh Court it is held that the section does not apply unless the deceased's domicile was Scottish [14] at the date of the will [15] or of his death. If the section operates in favour of two or more persons, they are both or all entitled to confirmation, and each must accept, or decline, or be otherwise accounted for, as if they had been expressly named executors.[16] Contingent beneficiaries are not within the section.

827. If the residuary legatee takes a vested right and sells his interest, there is nothing to prevent the seller being confirmed as executor-nominate of the testator, and that title will accresce to the purchaser. Or if the seller's intervening death prevents that procedure, the purchaser may be confirmed as executor of the testator; but in practice it is held that this does not fall under the 1900 Act, and that the purchaser must proceed by initial writ for confirmation as executor-dative of the testator, which entails the finding of caution, probably restricted. If the residuary legatee takes a vested right and dies without selling and also without confirming to the testator's estate, there must be two confirmations—(1) the successor of the residuary legatee will confirm as executor-nominate or -dative to his estate; and (2) the same person will confirm as executor-dative to the estate of the first testator.[1] If, however, the original bequest is to "A. and his heirs" and A. predeceases the testator, and the bequest is taken by B. as "heir," confirmation issues to B. as substitute general disponee, though a special warrant may be required.[2]

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[1] *Forrest*, 9th Mar. 1904.

[2] *Wilson*, 20th Oct. 1900.

[3] *Ferguson*, 28th Sept. 1900.

[4] *Hermann*, 17th Sept. 1902.

[5] *Forsyth*, 10th Sept. 1900.

[6] *Cowan*, 10th Jan. 1910.

[7] *Macintyre* v. *Miller*, 1900, 7 S.L.T. 435.

[8] *Forsyth* v. *Turnbull*, 1887, 15 R. 172.

[9] *Maclagan's Trs.* v. *Lord Advocate*, 1903, 11 S.L.T. 227.

[10] *Easson* v. *Thomson's Trs.*, 1879, 7 R. 251; *Dunsmure* v. *Dunsmure*, 1879, 7 R. 261; *Taylor* v. *Tweedie*, [1922] 1 Ch. 569.

[11] *Keith* v. *Fraser*, 1883, 20 S.L.R. 785.

[12] *Lethem* v. *Evans*, 1918, 1 S.L.T. 27.

[13] *Reid* v. *Dobie*, 1921 S.C. 662; *M'Gown* v. *M'Kinlay*, 1835, 14 S. 105.

[14] *Jamieson*, 31st Oct. 1902; *Callander*, 17th Apr. 1903.

[15] Wills Act, 1861 (24 & 25 Vict. c. 114), s. 1; *Bain*, April 1903; at least if the deceased was a British subject.

[16] *Cowan*, 10th Jan. 1910.

SUBSECTION (5).—*Assumed and Nominated Trustees.*

828. Where the trustees originally named would be entitled to confirmation as executors-nominate, any trustees whom they may assume, or whom the Court may appoint as substitute trustees, are also entitled to confirmation as executors-nominate. If assumption be followed by resignation of the assuming trustee, the assumed trustee may be solely confirmed. This was the practice before the 1900 Act.[3]

SUBSECTION (6).—*Specialties of Appointment.*

829. (1) Where there is a class appointment, *e.g.* an appointment of "my family" to be the executors, the language has to be construed, and the whole class must accept or decline, or be otherwise accounted for,[4] for which purpose an initial writ is required. (2) In the case of an appointment in succession, *e.g.* "my children in succession from the eldest downwards," the eldest child will in the first instance be confirmed alone.[5] (3) Where the appointment is *ex officio*, *e.g.* the rector of the Royal High School *ex officio*, the first confirmation is limited to the person in office at the date of the grant, without any reference to successors[6]; and from the express nature of the appointment it is assumed that it would fall by the executor ceasing to hold the qualifying office,[7] and this view is acted on in the terms of the confirmation. (4) Conditional appointments do not receive effect unless and until the condition has been fulfilled, as shewn in an initial writ for special warrant[8]; but the condition may be only on acting, *e.g.* A. and B., but each to be entitled to act only when in this country. In such a case both will be confirmed with a repetition of the condition in the confirmation.[9] The condition may be of a different kind, namely, that in certain events new trustees must be assumed; this will be repeated in the confirmation.[1] (5) In the case of limited appointments, *e.g.* the testator's wife during viduity, the condition is repeated in the confirmation.[2] (6) Where there are partial appointments, *e.g.* separate appointments, whether in one or two wills, for different parts of the estate, those parts are distinguished in the inventory and confirmation. The confirmation must include the whole estate, but each appointee will be confirmed only to his apportioned part.[3] (7) Corporations may be confirmed on an inventory given up by an official under authority of the board.[4] (8) A *sine quo non* should swear to the inventory.[5] (9) Married women may act independently of their husbands and without any reference to the latter's consent. This was the rule even before the Married Women's Property Act. (10) Pupils and minors may be confirmed,[6] but it is undesirable, and attention is directed to the procedure by a commissary factor, which is very useful but not now apparently so well known as in former times. The appointment of factor is made in the Commissary Court, and he may then be confirmed alone as executor. This holds even in testate cases.[7] Appointments as commissary factors may be in favour of two persons and the survivor.[8] A commissary factor may be appointed even when the father is alive, if he consents; *e.g.* when he is abroad.[9]

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[1] Bell's Prin., s. 1896.

[2] *Muir*, 23rd Mar. 1906; *Anderson*, 16th Oct. 1911.

[3] *Thomson*, 9th Jan. 1900.

[4] *Lee*, 30th May 1859; *Reid*, 20th May 1873; *Cotton*, 11th Mar. 1875.

[5] *Bremner*, 17th Mar. 1881.

[6] *Sibbald*, 6th Jan. 1869; *Rutherford*, 2nd June 1883.

[7] Cf. *Johnston's Exr.* v. *Dobie*, 1907 S.C. 31.

[8] *Simpson*, 18th Jan. 1877; *Stewart*, 8th Mar. 1877.

[9] *Key*, 11th Feb. 1880; *Allan*, 10th Apr. 1884.

SECTION 6.—CONFIRMATION OF EXECUTORS-DATIVE.

SUBSECTION (1).—*When necessary.*

830. In the case of intestate succession confirmation was formerly necessary, not only as an active title, but to vest the right of succession in the next-of-kin. But this was removed by the Confirmation of Executors (Scotland) Act, 1823,[10] and the effect was that the beneficial interest vested in the next-of-kin at the death and not, as previously, in those who were next-of-kin at the date of the confirmation. An appointment as executor-dative may be necessary in testate cases, *e.g.* if all the express or constructive executors-nominate have died and the grant has to be given to their representatives.

SUBSECTION (2).—*Who are entitled to be appointed.*

831. The order of priority among claimants for the office of executor-dative has been a good deal modified by more or less recent legislation, but prior thereto the order stood thus: (1) a general disponee; (2) the next-of-kin; (3) the widow; (4) creditors; (5) ordinary legatees.[11] In view of legislation these rules may be annotated as follows: (1) General disponees are now, by the Executors (Scotland) Act, 1900,[1] constructive executors-nominate, and therefore need no decerniture. (2) By the Intestate Moveable Succession Act, 1855,[2] the representatives of predeceasing next-of-kin are postponed to the surviving next-of-kin in the claim to the office of executor-dative. (3) As a result of the right of succession conferred by the same Act on the father alongside of the next-of-kin, he is entitled to be conjoined with them in the office.[3] (4) When the right conferred on the mother by the same Act, and enlarged by the Intestate Moveable Succession (Scotland) Act, 1919,[4] alongside of the next-of-kin comes into force, she is in like manner entitled to be conjoined with them as executor-dative.[5] At least that is what happened in the case cited, where, however, there was no opposition; but the mother's claim is supported by the reasoning in the case of *Webster*. (5) It seems probable that similar reasoning would entitle brothers and sisters uterine, receiving a share under the Act of 1855, to be conjoined as executors-dative with the next-of-kin even in a contested case; a grant has been made to brothers and sisters uterine entitled under the Act. (6) When the widow takes the whole estate because not exceeding £500, she has an exclusive title to the office of executrix-dative;[6] this postulates Scottish domicile, total[7] intestacy, and no issue. (7) Since the Married Women's Property Act, 1881,[8] the surviving husband is, or may be, entitled to *jus relicti*, and when he has that beneficial right he has a title to the office of executor-dative of his wife, but not in competition with her next-of-kin.[9] (8) In intestate cases commissary factors for pupils and minors (referred to *supra*) are more common than in testate cases, for the obvious reason that executors-nominate are usually major.

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[1] *Clark*, 1st Dec. 1885; *Mason*, 23rd Apr. 1889.

[2] *Mason, supra.*

[3] *Murray*, 2nd Nov. 1861; *Leslie*, 2nd Dec. 1861; *Muir*, 26th May 1886.

[4] *Scott*, 12th Sept. 1854.

[5] *Maconochie*, 2nd Oct. 1885; *Govan*, 8th Sept. 1886.

[6] *M'Donald*, 2nd Jan. 1890

[7] *Eddington*, 15th Jan. 1913.

[8] *Jobson*, 21st Dec. 1900.

[9] *Palumbo*, 14th July 1870.

[10] 4 Geo. IV. c. 98.

[11] Erskine, iii. 9, 32; Bell, Com. ii. 78; *Stewart* v. *Kerr*, 1890, 17 R. 707.

SECTION 7.—CONTENTS OF INVENTORY AND CONFIRMATION.

SUBSECTION (1).—*Estate to be included.*

832. There must always be a full and complete inventory of personal estate, wherever situated, deponed to as such, even in the case of an executor-creditor, but when the domicile was not in the United Kingdom the existence of Dominion and foreign estate is simply mentioned without specification. If the domicile was not in Scotland, the confirmation is limited to the Scottish estate. In every case the whole Scottish estate must be confirmed, except in the case of executor-creditors. In no case can there be confirmed any estate out of Great Britain.

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[1] 63 & 64 Vict. c. 55.
[2] 18 & 19 Vict. c. 23.
[3] *Webster* v. *Shiress*, 1878, 6 R. 102;
[4] 9 & 10 Geo. V. c. 61.
[5] *Muir*, 1876, 4 R. 74.
[6] Intestate Husband's Estate (Scotland) Act, 1919, 9 Geo. V. c. 9.
[7] *Taylor's Exrs.* v. *Taylor*, 1918 S.C. 207.
[8] 44 & 45 Vict. c. 21.
[9] *Campbell* v. *Falconer*, 1891, 19 R. 563.

833. As regards Scottish assets, the confirmation is a title only to assets included in it. The latest recognition of this is in s. 5 (2) of the Conveyancing (Scotland) Act, 1924,[1] which deals with the title of an executor to heritable securities, and is in terms limited to "any confirmation in favour of an executor of such deceased which includes such security." This is in marked contrast to the extent of recognition, as a title, accorded in the immediately following subsection of the Act to English or Northern Irish probate or letters of administration resealed in Scotland.

SUBSECTION (2).—*Valuation of Estate.*

834. Questions of importance and difficulty arise in regard to the amount to be carried out into the money column of the inventory, and so into the total in the confirmation, in the case of various assets. First, there is the pure question of valuation. The general rule is that laid down in the Finance Act, 1894,[2] s. 7 (5), viz.: "The principal value of any property shall be estimated to be the price which in the opinion of the Commissioners [of Inland Revenue] such property would fetch if sold in the open market at the time of the death of the deceased." This does not mean that the Commissioners are arbitrary judges or are final. A great variety of considerations come into operation, and the application of these to actual cases has often most important results. Here it must suffice to say that the advantages of this statutory standard are too often overlooked, with the result of carrying into the column sums larger than need be. It may usually be assumed, for example, that a debenture bond with an unexpired currency, or a heritable security fettered with a time-bargain, no matter how well secured, is not worth, and ought not to be entered at, par. In this respect care must be taken to distinguish cases in which an asset is carried out at a final valuation below par and other cases in which, owing to complications, an interim sum is entered subject to adjustment at a later date, after realisation or otherwise. No ambiguity should be allowed to arise as to which of these two courses is being adopted.

SUBSECTION (3).—*Extent of Title obtained.*

835. Next, there is the legal question of the extent of the title when an asset is entered and confirmed at a figure below par. It is suggested that older decisions may be displaced or affected by the statutory standard laid down in the section above mentioned. It cannot now be said that, in order to enable an executor to give a valid discharge, there must be produced a confirmation with inventory attached, shewing that the asset has been valued and confirmed at its full face amount. That it is not so in the case of quoted securities is clear; *e.g.* £1000 of a certain stock confirmed at £900, being the proper Exchange quotation at the date of death, may certainly be sold or discharged at anything up to par or over, and no subsequent attempted confirmation of an alleged under-valued margin could carry anything. The case cited below[1] is worthy of very close attention, and the adverse comments which have been made upon it[2] are thought to be clearly unsound. But, of course, there is a great difference between, on the one hand, "giving up" a £1000 debenture bond "to the extent of £500," which an executor-creditor might very well do, and, on the other hand, giving up the same bond "at its present value of 50 per cent." and carrying out £500.

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[1] 14 & 15 Geo. V. c. 27.

[2] 57 & 58 Vict. c. 30.

836. Interests in expectancy are allowed to be treated in a special manner.[3] The executor may pay estate duty at the owner's death, or he may postpone payment till the fund falls in on the death of the liferenter. Naturally the valuation is on different bases in the two cases, but for the present purpose the point is that, even if he postpones paying the duty, the executor obtains an immediate title by the confirmation. So far as is known this is the only instance possible of obtaining confirmation on credit; and it is credit without security, for apparently the unpaid duty is not a charge on the expectant interest as against, *e.g.* a purchaser from the executor.

SECTION 8.—THE OATH.

SUBSECTION (1).—*Before Whom to be taken.*

837. Oaths and affirmations to inventories of personal estate, and to revenue statements appended thereto, may be taken before the sheriff or sheriff-substitute or any commissioner appointed by the sheriff, or before any commissary clerk or his depute, or before any sheriff-clerk or his depute (*i.e.* whether the Clerk of the Court where the business is proceeding or not), or before any notary public, magistrate, or justice of the peace in the United Kingdom, or, if taken in England or Ireland, before any Commissioner for Oaths, or, if taken out of the United Kingdom, before any British consul or local magistrate or any notary public there practising or admitted and practising in the United Kingdom.[4] If the deponent is unable to sign, a statement to that effect, and of the cause, is added and the official signs alone. A trustee or executor *sine quo non* must sign.[5]

SUBSECTION (2).—*By Whom to be taken.*

838. Where the purpose is to obtain confirmation, the oath must be by some person who is entitled to confirmation either as executor-nominate or -dative. But if confirmation is not required, and the purpose is merely to pay duty, no appointment or decerniture as executor is necessary. Anyone who has an interest as next-of-kin, legatee, or otherwise, or as representing the beneficiaries in any character, may make oath and pay the duty; every person who intromits with the estate, with or without a title as executor, is bound to do so.[1] In such cases, if confirmation should be required afterwards, any executor duly appointed may, in a special oath, crave confirmation of the inventory already recorded. If the executor is abroad, the oath may be taken by an attorney or mandatory, the appointment being exhibited and (if not registered for preservation) recorded with the inventory.

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[1] *Brown* v. *Millar*, 1853, 16 D. 225.

[2] Alexander, Practice of the Commissary Courts, 53.

[3] Finance Act, 1894, s. 7 (6).

[4] 63 & 64 Vict. c. 55, s. 8.

[5] *Maconochie*, 2nd Oct. 1885; *Govan*, 8th Sept. 1886.

SUBSECTION (3).—*Contents of Oath.*

839. The fact of death, with place and date, must be averred, and the domicile. The inventory must be deponed to as a full and complete inventory of the personal estate, not only situated in Scotland or in the United Kingdom, but wheresoever situated, and whether subject to death duty or not. But in cases of domicile out of the United Kingdom, all that is required, as regards assets out of the United Kingdom, is a note of their existence without specification. If, before confirmation is issued, additional facts are ascertained, or the position has changed, an additional oath may be sworn by the same or by any other executor. There must be produced with the oath all unrevoked testamentary writings, whether relating to the personal estate or not, if in the custody or power of the deponent,[2] which covers all registered writings of which extracts can be obtained. Failing anything better, a copy may be received.[3] The general rule is that the whole of the documents produced must be recorded without omission,[4] but exceptions have been admitted in the case of mutual wills,[5] and to the extent of excluding from registration passages which are not testamentary and appear to be slanderous.

SECTION 9.—DEBTS AND FUNERAL EXPENSES.

840. The deduction of debts and funeral expenses has since 1881 been allowed to be made from the inventory when applying for confirmation. It is now regulated by s. 7 (1) and (2) of the Finance Act, 1894. There is a general right of deduction of debts and incumbrances subject to the following exceptions or qualifications: (1) So far as incurred or created by the deceased, there is no right of deduction "unless such debts or incumbrances were incurred or created *bona fide*, for full consideration in money or money's worth, wholly for the deceased's own use and benefit, and to take effect out of his interest." Under this rule marriage provisions cannot be deducted, whether made by a spouse or by a third party, and though expressly in consideration of counter-provisions. The reasons are that marriage is onerous, but it is not money or money's worth, and marriage is always part of the consideration, so that even with counter-considerations no provision is ever for "full" consideration in money. Nor can unpaid charitable donations be deducted. (2) There can be no deduction for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained. (3) Debts or incumbrances incurred or created for the purpose or in consideration of the purchase or extinction of any interest in expectancy in any property passing or deemed to pass on death, if the person whose interest is so purchased or extinguished becomes entitled from or through the deceased (including intestacy) to any interest in that property; the debt or incumbrance is not deductible (with qualifications). (4) As to debts due to persons resident out of the United Kingdom, the position is that they are treated as home debts if contracted to be paid in the United Kingdom, or charged on property in the United Kingdom. Otherwise they are not deductible in the first instance, except to the extent of any property out of the United Kingdom on which duty is paid, but later there may be a repayment claim, if the personal property of the deceased in the country where the creditor resides is insufficient for payment of the debt, and to the extent of the insufficiency. In practice, if there are no assets abroad a foreign debt is allowed to be deducted in the first instance.

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[1] *New York Breweries Co.* v. *Att.-Gen.*, [1899] A.C. 71.

[2] 48 Geo. III. c. 149, s. 38.

[3] *Dryburgh*, 4th June 1878.

[4] *Brown*, 19th Dec. 1865.

[5] *Maxwell, Petr.*, 1925, S.L.T. (Sh. Ct.) 47.

841. Debts and incumbrances incurred or created, not by the deceased, but by predecessors, outstanding at the death, and affecting the deceased or his estate, are deductible, without regard to the nature of their origin, whether for money or money's worth or not. There is high authority that in Scotland mournings for widow, children in the house, and servants are either debts or funeral expenses.[1]

SECTION 10.—CAUTION FOR EXECUTORS-DATIVE.

SUBSECTION (1).—*General Rules.*

842. It was at one time the practice to require caution from all executors, whether nominate or dative, to the full amount of the inventory. But by the Act of 1823 [2] caution was dispensed with in the case of executors-nominate, and restriction of caution was authorised in the case of executors-dative. Ordinary judicial factors do not require confirmation,[3] and constructive or statutory executors-nominate are, like all other executors-nominate, entitled to confirmation without caution. Caution for an executor-creditor is, without any interlocutor of restriction, limited to the amount to which he confirms. Even yet, however, there are cases in which, to facilitate matters, executors-nominate find caution; and as to cases to which the Colonial Probates Act, 1892, applies, see below.[1] Caution by an executor-dative cannot be altogether dispensed with, but the amount at which it may be fixed is entirely in the discretion of the Court. If not judicially restricted, the rule is that caution must be found for the full gross amount of the estate in the inventory which is to be confirmed, without deduction for debts or funeral expenses. In certain cases cross-claims or set-off may receive effect in the inventory instead of in the schedule of debts, with the result of reducing the maximum of caution; the best instance is a life policy, say for £1000, charged with a loan of £600 from the company of issue, in which case only the balance of £400 need be brought into the inventory summation; but the same method is allowed in many less obvious cases. The bond of caution is never delivered up.

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[1] Ersk., iii. 9, 22, 43; Bell's Prin., s. 1403; Fraser, H. and W. 900; *Griffith's Trs.* v. *Griffith*, 1912 S.C. 626.

[2] 4 Geo. IV. c. 98.

[3] Judicial Factors (Scotland) Act, 1889 (52 & 53 Vict. c. 39), s. 13.

SUBSECTION (2).—*Restriction of Caution.*

843. If full caution in the sense here explained is not to be found, there must be an application for restriction of caution. This requires an application by initial writ by the executor-dative decerned. It sets out (1) the pursuer's inability to find full caution and the restricted amount suggested; (2) the gross amount of the estate; (3) the total of debts and funeral expenses, and how far unpaid; (4) the beneficial successors, their relationship, their shares, which of them consent to the restriction proposed, and the ages of minor consenters. Consents must be in writing; they may be by guardians,[2] and even consents by minors approaching majority may receive some weight. Objections are made by written note of objections, stating interest and ground of objection. Restriction may be refused even in the absence of objection.[3] There must be advertisement of the application for restriction, and the advertisement must state the proposed amount of caution.[4] If the debts have been paid, and all beneficiaries consent, the caution is usually reduced to a very small sum in proportion to the estate.

844. Under other circumstances there has apparently been a practice of accepting caution to an amount supposed to be adequate to safeguard the interests of non-consenters. This practice apparently proceeds on the view that consenters cannot complain, and on the assumption that the non-consenters would have a preference on the cautionary fund. It is suggested that this assumption is without legal basis. Take the case of an estate of £3000 falling equally to the executor himself and B. and C.; B. consenting to a restriction of caution to £1000, and C. being beyond reach at the time; caution is restricted, and the executor embezzles the whole fund; the cautioner pays £1000; it is suggested that B.'s claim upon that fund would be just as good as C's., at least under the ordinary form of consent to restriction, though a different result could be brought about by a different form of document, which, however, is believed to be at present unknown in practice. An appropriation *in gremio* of the bond of caution would also meet the case, but probably that would be incompetent.

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[1] Para. 864 *et seq.*

[2] *Szillassy*, 12th Nov. 1886.

[3] *Nicolson*, 9th Nov. 1871.

[4] Commissary's Order, 26th Sept. 1870.

SUBSECTION (3).—*Who may be Cautioner.*

845. The cautioner must be resident in Scotland or otherwise subject to the jurisdiction of the Scottish Courts.[1] He must not be beneficially interested in the succession. Women, including now married women,[2] are competent to act. In some districts the agent in the estate will not be accepted. Companies, as such, are not now incompetent, and in fact the great majority of executry cautionary bonds are now given by companies. There may be one or more cautioners; if two or more, they are usually taken bound jointly and severally, though occasionally each is taken only for his proportionate share of the whole.

SECTION 11.—SMALL ESTATES.

SUBSECTION (1).—*General.*

846. So far as confirmation procedure is concerned, simple and economical machinery has been provided by the Intestates' Widows and Children (Scotland) Act, 1875,[3] the Small Estates (Scotland) Act, 1876,[4] the Customs and Inland Revenue Act, 1881,[5] and the Finance Act, 1894.[6]

847. Four limits of small estates are known, viz. £100 net, £300 gross, £500 gross, and £1000 net. The first and fourth of these apply for death duty purposes only; the second and third apply both for those purposes and also for confirmation facilities. If the net estate, heritable and moveable, on which estate duty would otherwise be payable, does not exceed £100, no death duty is payable, no matter how large the gross estate may be. If the net estate, heritable and moveable, on which estate duty is payable, exclusive of property settled otherwise than by the will of the deceased, does not exceed £1000, it is an "estate by itself," *i.e.* not liable to aggregation, and payment of estate duty exempts from legacy and succession duty. The £300 and £500 limits are applied to the whole *gross* estate, heritable and moveable, subject to estate duty, exclusive of property settled otherwise than by the will of the deceased. The same rules are applied to the £300 and £500 limits, except that the estate duty is £1, 10s. in the former case and £2, 10s. in the latter.

848. The benefits are: (1) the exclusion or limitation of aggregation; (2) the fixed sums of estate duty, which are usually a saving, and there is no legacy or succession duty; (3) even in intestate cases there is no initial writ and no decerniture; (4) local facilities, applications being made through Inland Revenue officers; (5) the ordinary official fees, these now being held to apply to small estates, entitle the applicant to have the whole work in an ordinary case, including the preparation of the inventory, oath, etc., done by the Commissary or Sheriff-clerk; (6) resealing in England and Ireland, where necessary, at a nominal expense. The scope of these benefits is very wide, for they apply whether the deceased died testate or intestate; wherever he was domiciled; whoever may be the beneficiaries or successors; whoever may be the applicant for confirmation, even a creditor or funerator. On the other hand it is held that the procedure is limited to non-contentious cases where there is no competition for the office of executor;[1] and it is difficult to see how otherwise the system could be worked.

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[1] *Dudgeon*, 23rd Apr. 1862.

[2] Cf. *French*, 1871, 9 M. 741; but see *Ross* (*Fraser's J. F.*), 1892, 19 R. 500.

[3] 38 & 39 Vict. c. 41.

[4] 39 & 40 Vict. c. 24.

[5] 44 Vict. c. 12.

[6] 57 & 58 Vict. c. 30.

SUBSECTION (2).—*Ascertainment of Amount of Estate.*

849. As regards the exclusion or limitation of the principle of aggregation, heritable estate is included, but, whether heritable or moveable, the following are excluded: (1) property settled otherwise than by the will of the deceased, which covers an investment in joint names and survivor, even though the deceased has power of sale without consent;[2] (2) interests in expectancy; (3) life policies in cases of presumed death; (4) powers of general disposal not exercised; (5) property liferented by the deceased; (6) Dominion and foreign personal property if the deceased was not domiciled in Great Britain, and in those cases that now operates to exclude all such estate. The official view is that the fixed duties of £1, 10s. and £2, 10s. can never cover estate settled otherwise than by the will of the deceased, even though its inclusion would still not bring the total over £300 or £500. Thus if there is a small house, counting for £150, and other estate £350, it is said that the fixed duty of £2, 10s. covers only the £350 and not the £150. It is for consideration whether that is the correct reading of s. 16 of the Finance Act, 1894; the claim for additional duty on the settled estate has not always been pressed.

850. Although the limits of amount are expressed as applying to gross[2] estate, quite a number of deductions are allowed, *e.g.*: (1) incumbrances not created by the deceased; (2) unpaid price of heritable property, and loans, secured or unsecured, borrowed to finance the purchase, or to finance building or material improvements; and (3) loans on life policies, if made by, or intimated to, the office of issue. The official form contains no schedule of debts, and thus deductions must be made from the appropriate assets in the body of the inventory.

SUBSECTION (3).—£300 *Limit under Inland Revenue Act,* 1881.

851. The Customs and Inland Revenue Act, 1881, made similar provision for a gross personal estate not exceeding £300, irrespective of what heritable estate there might be. In the Edinburgh Commissary

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[1] *Duncan,* 31st Oct. 1889.

[2] *Dand,* 12th Jan. 1904.

Court it is held [1] that, irrespective of the date of death, that Act is still in force to the effect of avoiding an initial writ in intestate cases where the gross personal estate does not exceed £300, though the gross total estate exceeds £500; but not to the effect of preserving the £1, 10s. duty in such a case.

SUBSECTION (4).—*Procedure.*

852. The application for confirmation on these small estates is made to the Edinburgh Commissary Clerk when the deceased died domiciled in the County of Edinburgh or furth of Scotland, or without any fixed or known domicile; otherwise to the sheriff-clerk of the county of the domicile. From information supplied by the applicant, the clerk fills up the inventory, oath, and other papers. He may require proof of identity and relationship, and in practice does so in intestate cases. If in intestate cases restriction of caution is required, there must be an application by initial writ, which is not within the clerk's duties. If re-sealing is required in England or Ireland, the clerk attends to that, and it costs only 2s. 6d.

SECTION 12.—ADDITIONAL INVENTORIES AND CONFIRMATIONS.

SUBSECTION (1).—*Additional Inventories.*

853. By the Revenue Act, 1808,[2] additional estate discovered after the recording of the original inventory had to be given up in an additional inventory within two months of the discovery. An "additional" inventory may not always shew additional value; the new item may be shares saleable only at a discount; but, nevertheless, an eik to the confirmation may be required, and will be granted, for purposes of title. In an intestate case of that kind, no further caution would be required. Partial confirmation being incompetent, the eik must include all estate not already confirmed, though a previous inventory may have been recorded, and though duty has already been paid. The occasion may also be taken to adjust figures in respect of previous over-valuation of assets, or non-deduction or over-deduction of debts. There may be successive additional inventories, and a succession of eiks described as first, second, etc.

SUBSECTION (2).—*Additional Confirmations.*

(i) *Confirmation ad omissa vel male appretiata.*

854. This is the ordinary case where estate has been omitted from the first inventory or under-valued in it. Any person having interest may apply for it, but he must call the executor already in the saddle; and if there has been nothing fraudulent, the latter may obtain an eik, instead of confirmation *ad omissa vel male appretiata* being granted to the new applicant.

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[1] Order by Sheriff, 5th Mar. 1900.

[2] 48 Geo. III. c. 149, s. 38.

(ii) *Confirmation ad non executa.*

855. This is a grant to B. of estate the administration of which has not been executed by the original executor A. Until the Executors Act, 1900,[1] it was available only if the first executor had not uplifted the asset, but by s. 7 of that Act its use is extended to cases where the first executor has uplifted but has not distributed.

Subsection (3).—*Corrective Inventories.*

856. Corrective inventories are frequently necessary though there may be no additional estate, but merely to adjust estate duty. In such cases they go direct to the Inland Revenue without passing through the Commissary Office; and indeed important adjustments of estate duty often proceed in even a simpler form.

Section 13.—The Resealing of Scottish Confirmations.[2]

Subsection (1).—*Introductory.*

857. It will be understood that the facility of resealing any grant, whether the resealing of a Scottish grant outside Scotland or the resealing in Scotland of a non-Scottish grant, is only an optional alternative to the obtaining of separate grants in each or all of the countries concerned, which is always competent. But when resealing is competent, it has distinct advantages, especially now that official fees on original grants have been so much increased. The practice of resealing within the then United Kingdom was introduced by the Confirmation and Probate Act, 1858,[3] s. 9. This section is limited to the resealing of Scottish confirmations.

Subsection (2).—*Resealing in England.*

858. This stands substantially as it was originally introduced. It is essential that the domicile of the deceased shall have been in Scotland, and that fact must be officially certified in the confirmation or in a "notation" on the confirmation. The inventory and confirmation then detail all the English personal assets as well as those in Scotland. They are kept separate in the sworn inventory, and in the copy of that document which is attached to the confirmation. An error in this respect may cause rather serious trouble. On production of the confirmation and a copy in the principal probate registry in London (which cannot be done by post) the seal of that Court is affixed. The confirmation then has the same force as an original English grant. But resealing is not required for stock, etc., of (1) the British Government,[4] or (2) the British railways.[5]

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[1] 63 & 64 Vict. c. 55.

[2] In this and the next section matters relating to liability for, and mode of payment of, death duties (British or Irish) have not been gone into.

[3] 21 & 22 Vict. c. 56.

[4] Finance Act (No. 2), 1915, s. 48.

[5] See the different amalgamation schemes.

SUBSECTION (3).—*Resealing in Northern Ireland.*

859. (1) If the death was before 22nd November 1921, the procedure is exactly the same as has been stated above for England, except that the resealing is in Dublin. It matters not what may be the date of the Scottish confirmation or of the application for resealing. (2) If the death was on or after 22nd November 1921 the difference is that Northern Irish death duty has to be paid in Belfast on the assets in that State. The Scottish domicile is certified in the confirmation. The confirmation and copy inventory attached contain the Northern Irish assets in the form of a note, not carried out into the summation. The Northern Irish debts due by the deceased are not in the ordinary course deductible for British estate duty. If caution is required, it covers the Northern Irish assets. The confirmation is resealed in Belfast, and that gives a title to those assets, but there has to be an affidavit there and the other procedure, as in an application in Northern Ireland for an original grant.

SUBSECTION (4).—*Resealing in the Irish Free State.*

860. (1) If the death was before 1st April 1923, the previous practice holds, just as in the case of resealing in England, and it is done in Dublin as previously. (2) If the death was on or after 1st April 1923 there is no resealing; a separate Irish Free State grant is obtained, whether probate or letters of administration.

SECTION 14.—THE RESEALING IN SCOTLAND OF ENGLISH AND IRISH GRANTS.

SUBSECTION (1).—*English Grants.*

861. The procedure is the same *vice versa* as in the case of resealing a Scottish confirmation in London. The domicile of the deceased must have been in England and there must be a "notation" of it on the grant. The resealed grant has the effect of a Scottish confirmation. There is this practical difference that no English grant is accompanied by an inventory or schedule of assets; there is only a statement of the gross amount. No one, therefore, to whom the title is produced has any means of knowing whether the claim made against him, or the particular asset in which he is interested, has been "given up" at all or, if it has, at what it has been valued. According to the English law no debtor or other party is bound or entitled to concern himself with any such question. These are not questions of title. This receives effect in the Conveyancing (Scotland) Act, 1924,[1] s. 5 (1) (*b*), where it is enacted that the confirmation "implied" in any probate or letters of administration from any Court in England or Northern Ireland, or any part of H.M. Dominions, resealed in Edinburgh under the Confirmation and

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[1] 14 & 15 Geo. V. c. 27.

Probate Act 1858,[1] or the Colonial Probates Act, 1892,[2] "shall be deemed to include all heritable securities which belonged to the deceased and from which executors are not excluded"; thus shutting out all enquiry regarding what may, or may not, have been contained in the accounts which were filed in the Court of issue or resealing of the grant.

SUBSECTION (2).—*Northern Irish Grants.*

862. (1) In the case of death before 22nd November 1921 there is no change from the old procedure, which was the same as in the case of English grants. (2) In the case of death on or after 22nd November 1921, the grant is produced in Edinburgh with a copy. It bears that the deceased was domiciled in Northern Ireland. There must be an inventory of the personal estate other than that in Northern Ireland, but it is not reproduced in the certificate of resealing.

SUBSECTION (3).—*Irish Free State Grants.*

863. (1) If the death was before 1st April 1923, the procedure is the same as in the case of English grants. (2) If death occurred on or after that date, there is no resealing, but a separate Scottish confirmation is obtained. In intestate cases, and where there is no nomination of an executor, there must be an initial writ for the appointment of an executor-dative; and the nominee of the domicile will be preferred to the office. If there is also English estate there would be an English grant also, separate both from the Irish and the Scottish grants. The Scottish and English grants must be limited to the assets in Scotland and England respectively; there can be no resealing even as between those two countries, for the deceased was *ex hypothesi* not domiciled in either of them.

SECTION 15.—DOMINION GRANTS.

864. By the Colonial Probates Act, 1892,[2] provision is made for reciprocity in the matter of title to personal estate between British Dominions and the United Kingdom. The Dominions to which the Act applies are fixed from time to time by Order in Council on evidence that those Dominions have made reciprocal provisions. By s. 3 the operation of the Act is extended to British Courts in a foreign country, and in those cases the 1892 Act applies without an Order in Council. Any probate or letters of administration granted by a Court to which the Act applies may on certain conditions be sealed in the Commissariot of Edinburgh, and thereafter it has the same force as an original Scottish grant. The Court here has a discretion to reseal or not.

865. Certain conditions are prescribed for resealing, and others are authorised. The Court "shall" be satisfied (1) that estate duty has been paid so far as due; (2) that when letters of administration are in question, caution has been given to an extent sufficient to cover the

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[1] 21 & 22 Vict. c. 56.

[2] 55 Vict. c. 6.

United Kingdom personal estate; and the Court may (3) require evidence of domicile, *i.e.* that the deceased was domiciled in the jurisdiction of the Court of issue; and (4) require security for payment of debts to creditors residing in the United Kingdom if any creditor so moves, and this whether the Dominion grant is probate or letters of administration.

866. Regulations have been made by the Sheriff of the Lothians and Peebles for applying the Act. There is required a stamped inventory of the Scottish estate with relative oath. In the case of letters of administration caution must be found to cover the estate in Scotland. The oath must set out the domicile, and if any doubt appears to arise whether the applicant would be entitled to confirmation in Scotland, there must be an application to the sheriff for special warrant to seal.

867. The Dominion Acts giving corresponding privileges in the Dominions to British grants of confirmation, probate, etc., are all in similar terms, and the resealing is carried through under the like conditions and with the like effect. The document sent from Scotland is either the confirmation itself or a duplicate, or an extract of the confirmation without the inventory; and where there is a will, it is usual to send an extract of it.

SECTION 16.—TITLE WITHOUT CONFIRMATION.

SUBSECTION (1).—*Preliminary.*

868. This may be understood in three senses, for (1) there are certain things which any executor can do in regard to any class of assets without confirmation; (2) there are certain substitutes for confirmation with reference to all classes of assets; and (3) there are special classes of assets, as to which privileges exist, displacing confirmation. But it will be understood that these rules have no bearing on liability for death duties.

SUBSECTION (2).—*Powers of Executors unconfirmed.*

869. Even before confirmation an executor, nominate or dative, is entitled to sue for the recovery of the estate,[1] and he may vote in a sequestration.[1] For these purposes the holder of a grant of representation from the court of a foreign domicile is in the same position before the grant has been resealed or an ancillary grant obtained in Scotland. But no executor can enforce payment, or grant an effectual discharge, until he has obtained confirmation.[2] As to an exception in the case of certain life policies, see below.

SUBSECTION (3).—*Substitutes for Confirmation.*

870. (1) When the Crown takes as *ultimus hæres*, the King's and Lord Treasurer's Remembrancer takes possession without the necessity for confirmation. A deed of gift by a donatory of the Crown is recognised in Scotland as a title without confirmation; but if there is English estate, it is necessary to proceed by decerniture and confirmation *qua* donee of the Crown and resealing in England.[1] (2) The act and warrant in favour of the trustee in the sequestration of a deceased debtor, sequestrated after his death, gives him a complete title without confirmation; but, if a surplus emerges, the beneficial successor requires confirmation to receive it from the trustee.[2] (3) The Judicial Factors (Scotland) Act, 1889 [3] (s. 13), provides that an official extract of the appointment of any judicial factor, trustee, tutor, curator, or other person judicially appointed and subject to the Judicial Factors (Scotland) Acts, shall have throughout the British Dominions the effect of an assignation or transfer, and all debtors and others are bound to pay on production of it, *i.e.* without any further title such as confirmation. But the factor may, if he chooses, be decerned and confirmed as executor-dative. (4) Special testamentary assignations of specific assets, though not confirmed, are a good title to the assets in question.[4]

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[1] *Chalmers' Trs.* v. *Watson*, 1860, 22 D. 1060.

[2] Erskine, iii. 9, 39; *Bones* v. *Morrison*, 1866, 5 M. 240; *Hinton, etc.* v. *Connell's Trs.*, 1883, 10 R. 1110. Inland Revenue Acts, 1884, s. 11; 1889, s. 19.

SUBSECTION (4).—*Privileged Estates.*

871. (1) Nominations of funds in the hands of various bodies and authorities, *e.g.* savings banks, friendly societies, industrial and provident societies, and trade unions, and of certain special funds such as National Savings Certificates, insurances under the Government Annuities Act, and National Health Insurance benefits are in effect informally executed wills. They are subject to a great variety of regulations differing in different cases, including in most cases a limit of moderate amount, but their common feature is that confirmation is or may be dispensed with. These nominations are examples of the old Scottish principle of special assignations above mentioned. (2) Even without any nomination, and in intestate cases, there are numerous positions in which parties entitled to receive money on another party's death are privileged to do so without confirmation. The most important case is that of life policies issued by a British office in favour of a person who dies domiciled out of the United Kingdom. This rests upon the Revenue Act, 1889,[5] s. 19. There is no limit of amount. All the other cases are subject to modest limits of £100 or less; they include bodies such as those mentioned above in connection with nominations and a good many others, *e.g.* the armed forces of the Crown, the mercantile marine, and public departments.

SECTION 17.—THE TRANSMISSION OF TRUST FUNDS.

SUBSECTION (1).—*Common Law Methods.*

872. This branch of the subject has reference to the case of a sole or last surviving trustee or executor dying before the personal assets, which form part of the trust or executry estate, have been distributed, or even, it may be, before they have been ingathered. The matter is dealt with in detail in ss. 6 and 7 of the Executors (Scotland) Act, 1900,[1] and it is also affected by the Trusts (Scotland) Act, 1921.[2] Apart from these enactments other procedure, also by confirmation, may be adopted in special circumstances. Thus, the trust asset may (improperly) have become immixed with the trustee's own proper estate; there is then really no trust estate at all except the claim against the trustee, and there may be nothing for it but to enter the whole estate in his inventory as his property, and to deduct the claim as a debt. But if, in a case of that kind, the facts are such that the trust beneficiaries are entitled to follow the fund preferentially, as by what in England is known as a tracing order, the statutory machinery mentioned below would apply. Again, the investment may have been taken in the name of the trustee as an individual, but in such circumstances that its identification as an asset of the trust is easy; it has been suggested that it should be entered in the inventory of the trustee's estate as if it had been his own, and that the same amount should be deducted as a debt. But the procedure under s. 6 of the Executors Act, 1900, dealt with below, is now regularly applied to such cases, although it might not be possible of application if the assets were English.

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[1] *Galbraith*, Sh. Ct., Stonehaven, 19th Feb. 1889.
[2] *Bell* v. *Glen*, 1883, not reported.
[3] 52 & 53 Vict. c. 39.
[4] 1690, c. 26, and 4 Geo. IV. c. 98, ss. 2, 3, 4.
[5] 52 & 53 Vict. c. 42.

SUBSECTION (2).—*Statutory Methods.*

(i) *The Executors (Scotland) Act*, 1900.[1]

873. Sec. 6 of this statute operates *quasi*-confirmation, not to the original deceased (who may be distinguished as the truster) but to the intervening trustee or executor. It is limited in four ways, for it applies only (1) where the trustee or executor was a trustee or executor-nominate; (2) where he has left an executor-nominate; (3) to funds in Scotland; and (4) to funds which were "standing or invested in his name as trustee or executor." If these conditions are satisfied, the method is that there may be annexed to the inventory of the proper personal estate of A., the sole or last surviving trustee of X., a note of the trust or executry funds of X.'s estate in question; the note is then repeated in the confirmation in favour of B., A.'s executor-nominate, and there is thereby conferred on B. a title to recover those funds of X.'s estate. But B. is not to continue the administration of X.'s estate; on the contrary he is to make over the funds in question to the persons legally authorised to continue that administration, or, where the administration is really ended, to the beneficiaries or their nominees. Notwithstanding the words "standing or invested in his name as trustee," this procedure is regularly, at least in some Courts, applied in practice to investments in the name of the deceased *ex facie* absolutely but truly in trust. The section expressly extends to English and Irish probates if resealed in Scotland, and in those cases there is no room and no need for a note of the funds in question. But it does not apply to English or Irish letters of administration, even in testate cases.

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[1] 63 & 64 Vict. c. 55.

[2] 11 & 12 Geo. V. c. 58.

(ii) *English and Irish Estates.*

874. Provision to meet the case of English and Irish assets in these trust and executry cases was made as early as 1876.[1] It proceeds by note of the trust assets on the inventory and confirmation of the trustee's own estate; resealing in England or Ireland then confers a title on the executor or administrator of the deceased trustee. The trustee must have died domiciled in Scotland and that fact must be "noted," but it matters not whether he died testate or intestate, nor that he had no estate of his own in England or Ireland. Cases where the trust character is not express have been dealt with above.[2]

(iii) 1900 *Act*, s. 7.

875. This section operates by confirmation *ad non executa* to the original deceased, who has been above distinguished as the truster. It is wider in its terms than s. 6, for it applies not only on the death, but also on the incapacity, of a sole or last surviving executor whether nominate or dative. It applies to the whole United Kingdom, subject to resealing. The section makes it clear that confirmation *ad non executa* is competent whether the estate had not been uplifted by the former executor, or had been uplifted and invested but not distributed; and also that the confirmation forms a title on which to continue and complete the administration. The section provides that confirmation *ad non executa* shall be granted to the same persons and according to the same rules as confirmation *ad omissa*, that is, to the persons who in their order at the date of the application would have been entitled to an original confirmation, if such had not already been expede. This section is limited to *mortis causa* cases, there being no reference to trusts. It is not to prejudice confirmation as executor-creditor.

(iv) *Trusts Act*, 1921.[3]

876. Under s. 2 of the Executors (Scotland) Act, 1900, an executor-nominate received all the powers of a trustee under the Trusts Acts; and under s. 2 of the 1921 Act an executor-nominate *is* a trustee; so that all the provisions of that Act apply to executors-nominate. Both Acts, therefore, confer power of assumption on executors-nominate. It also results that under s. 22 of the 1921 Act, if a sole or last surviving executor-nominate has died or become incapable, the Court of Session may appoint a new executor with warrant to complete title; and under s. 24 of the same Act, if the beneficiaries are absolutely entitled, they may complete a direct title.[1] But those methods have no application to executors-dative.

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[1] 39 & 40 Vict. c. 24, s. 3.

[2] *Supra*, para. 873.

[3] 11 & 12 Geo. V. c. 58.

SECTION 18.—CONFIRMATION AS EXECUTOR-CREDITOR.

SUBSECTION (1).—*Special Features.*

877. This form of confirmation is in certain circumstances available to (1) creditors of the deceased, and (2) creditors of the next-of-kin of the deceased. It differs essentially from every other kind of confirmation. It is really a diligence, and not properly a mere completion of title.[2] It may be, and usually is, partial only, that is to say, limited to particular assets or parts of assets, which is incompetent in any other species of confirmation. If the deceased was domiciled out of Scotland, there is a departure from the rule applicable to all other kinds of confirmation, for no regard is paid to the law of the domicile as regards either administrative title or beneficial right, and accordingly the creditor is not required to aver that by the law of the domicile he is entitled to administer. But although the grant may be partial it must be preceded by a full and complete inventory of the deceased's personal estate. that is to say an inventory deponed to as such.

SUBSECTION (2).—*How excluded.*

878. The diligence of confirmation *qua* creditor is excluded by (1) confirmation by any creditor of any class, *i.e.* confirmation of the same asset, or part of asset, and at the same value. But exclusion is not operated by a mere decree-dative appointing an executor, even though in favour of another creditor;[3] nor by a non-Scottish grant, unless it is resealable in Scotland and has been resealed. (2) Complete transference from the deceased as by, *e.g.* possession of corporeal moveables by his successors, or a special assignation by the deceased followed by intimation, or a bond of corroboration by the debtor to the deceased's creditor.[4] (3) Sequestration of the deceased's estate.[5] The debt which is the basis of the diligence must be liquid, and the document must be produced. If the debt be illiquid, decree must first be obtained.[6] The claim need not be pecuniary; it may be *ad factum præstandum*.[7] The creditor need not depone to the verity of the debt.[8]

SUBSECTION (3).—*Equalisation of Creditors.*

879. By Act of Sederunt, 28th February 1662, all creditors of the deceased doing diligence within six months after his death rank *pari passu* on the moveable estate. If an executor-creditor has confirmed within the six months, equality of ranking is obtained by citing him within that period, and even if he should have realised the asset, he must then distribute rateably among all entitled to the *pari passu* ranking. Within the six months any other creditor may claim to be conjoined in the grant if he makes the claim before confirmation. If any other class of executor is a creditor of the deceased, his confirmation has the force of the diligence of confirmation *qua* creditor.[1] These equalisation rules are the reason for the requirement that the creditor's initial writ must be gazetted immediately after presentation and before decree dative.

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[1] *Cowper and Ors., Petrs.*, 1897, 5 S.L.T. 85.

[2] *Smith's Trs.* v. *Grant*, 1862, 24 D. 1142, per Lord Curriehill at p. 1169.

[3] Bell, Com. ii. 81.

[4] *Smith's Trs.* v. *Grant, supra.*

[5] Bankruptcy Act, 1913, ss. 29 and 106.

[6] 1695, c. 41.

[7] *Jazdowski*, 19th Mar. 1889.

[8] *Greig* v. *Christie*, 1837, 15 S. 697.

SUBSECTION (4).—*Creditors of the Next-of-kin.*

880. The right of those creditors to confirmation of the deceased's estate rests on the Scots Act, 1695, c. 41. At common law the personal estate of a deceased person is preferentially available for payment of his own debts before being taken for the debts of his next-of-kin. By the common law this preference had no time-limit so long as the assets could be identified, and that is still the position where there has been confirmation. But in the absence of confirmation the preference is by the cited Act cut down to a year and a day after the death. This does not mean that confirmation in favour of a creditor of the next-of-kin cannot proceed till year and day have expired from the death. If granted within that time it will still exclude confirmation of the same assets by creditors of the deceased, but it will not prejudice their preference in distribution if enforced within the year and day. The death of the next-of-kin does not prevent his creditor from confirming as executor-creditor to the first deceased.[2]

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[1] *Ramsay* v. *Nairn*, 1708, M. 3934, 3139; *Macleod* v. *Wilson*, 1837, 15 P. 1043; Bell, Com. ii. 80.

[2] *Smith's Trs.* v. *Grant*, 1862, 24 D. 1142.

CONFIRMATION OF TRUSTEE.

See SEQUESTRATION.

CONFISCATION.

See CRIME (PUNISHMENT).

CONFUSIO.

TABLE OF CONTENTS.

	PAGE
Definition and Scope	386
Application of the Principle	387
Extinction of the Obligation	387
Suspension of the Obligation	387
Heir of Entail	388
Apparent Heir and Heir liable *preceptione hereditatis*	388
Application of the Principle (*contd.*)—	
Cautionary Obligations	389
Heritable and Moveable Debts	389
Heritable Bonds	389
Landlord and Tenant	390
Servitudes	390

Section 1.—Definition and Scope.

881. Where a person becomes, whether by succession or by singular title, the true debtor and true creditor in the same obligation, the one relation cancels the other, and the *jus crediti* is *ipso jure* extinguished *confusione.* Though *confusio* proper is applicable only to obligations which sound in money, it has been extended by analogy to cases which are not directly of that character.[1] More broadly stated, it may take effect wherever there is "the concurrence of two qualities in the same subject which mutually destroy each other."[2] It is a condition of the application of the rule, however, that full right to receive and full obligation to pay shall concur[3] and extinction takes place *ex lege*, independently of intention. *Confusio* is thus in character and effect different from payment and discharge. When payment is made the thing paid ceases to be due, but from the moment that the inconsistent characters of debtor and creditor are combined in the same person both debtor and creditor cease to exist; there is no longer any debt or any relation of debtor and creditor at all,[4] for a person can neither be his own creditor nor his own debtor.

882. *Confusio* operates *ipso jure* or not at all, and therefore cases in which separate feudal estates are vested in the one person are excluded from its operation, for a feudal estate once created cannot be extinguished otherwise than by observance of the proper feudal solemnities.[1] Similarly *confusio* cannot operate to extinguish ground-annuals, which are irredeemable rights in land constituted by infeftment.[1] Accordingly, although the two estates of the *dominium directum* and the *dominium utile* may be vested in the same feudal proprietor, these remain separate estates unless and until they are consolidated.[5] But although the feudal estates remain distinct, pecuniary obligations constituting proper debts will in such circumstances be extinguished. Thus feu-duties are extinguished *confusione* when the characters of superior and vassal unite in one person.[1]

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[1] *Healy & Young* v. *Main's Trs.*, 1914 S.C. 893 at p. 899.

[2] Pothier, by Evans, i. 425.

[3] Bell, Convey. i. 351.

[4] *Motherwell* v. *Manwell*, 1903, 5 F. 619, per Lord Kinnear at p. 631.

[5] *Bald* v. *Buchanan*, 1786, Mor. 15084.

SECTION 2.—APPLICATION OF THE PRINCIPLE.

SUBSECTION (1).—*Extinction of the Obligation.*

883. The principle takes effect where the debtor succeeds to the creditor, the creditor to the debtor, or a stranger to both; and to the extent of the debtor's interest.[2] Wherever *confusio*, in the proper sense, operates, it operates to the complete extinction of obligations, not to their mere temporary suspension.[3] Those cases in which the identity of debtor and creditor is held to produce mere suspension will be found to be, not exceptions to the rule, but cases to which the principle does not apply. It follows that where *confusio* applies, and the debt is extinguished by operation of law, no intention to maintain the debt as a separate estate by taking of conveyance or assignation thereto will avail.[4]

SUBSECTION (2).—*Suspension of the Obligation.*

884. On the other hand, where the rights of debtor and creditor apparently centre in the same person with the effect of merely suspending the obligation, it will be found either that there are two distinct legal characters or *personæ* meeting temporarily in him, or that there coexist in his person adverse interests preventing the absolute identity of debtor and creditor. The operation of the principle may thus be excluded.[5] In this class of cases two courses are open to the creditor: (1) He may, being *in titulo* to do so, unconditionally discharge the debt, in which case the obligation is extinguished. (2) He may take an assignation or conveyance to the debt, in favour of himself, a trustee, or a third party, and thus maintain it as a separate right. In such cases, if the creditor has any interest to keep up the debt, the presumption is generally against *confusio*.[6] Taking an assignation instead of a discharge is evidence for,[7] as the abstaining from doing so may be evidence against, an intention to keep up the debt. Retaining a bond undischarged is not sufficient evidence of such intention.[1] The most ordinary examples of this duality of character or interest are cases where the debtor imperfectly represents the creditor, or *vice versa, e.g.* heirs of entail; or where the obligation is accessory, and there is a right of relief over.

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[1] *Motherwell* v. *Manwell*, *supra*, per Lord Adam at p. 627.

[2] Ersk. iii. 4, 23; *Wright* v. *Smith*, 1716, Mor. 5209; *Love* v. *Storie*, 1863, 2 M. 22, per Lord Neaves at p. 31.

[3] *Healy & Young*, *supra*; *Lord Blantyre* v. *Dunn*, 1858, 20 D. 1188 at p. 1196.

[4] *Muir* v. *Calder*, 1635, Mor. 831; *Codrington* v. *Johnston's Trs.*, 1824, 2 Sh. App. 118; *Murray* v. *Parlane's Trs.*, 1890, 18 R. 287, at p. 288; *Balfour-Melville's Trs.* v. *Gowans*, 1896, 4 S.L.T. 111.

[5] *Mackenzie* v. *Gordon*, 1838, 16 S. 311, per Lord Corehouse at p. 324; *Fleming* v. *Imrie*, 1868, 6 M. 363, per L. J.-C. Patton at p. 367.

[6] *Mackenzie*, *supra*, at p. 324; Rankine, Land-Ownership, p. 711.

[7] *Fleming*, *supra*, at p. 367.

Subsection (3).—*Heir of Entail.*

885. Where an heir of entail becomes full debtor or debtor without relief, as by incurring liability as universal representative of the entailer,[2] or, being a creditor of the entailer, succeeds also to the debtor's unentailed estates,[3] his predecessor's debts are extinguished *confusione* in his person, and cannot thereafter be made good against subsequent heirs of entail. No taking of assignation, or declaration of intention. however clear, can here oust the operation of the principle.[4] On the other hand, where the heir in possession pays an entailer's debt, or where. being a creditor in debt affecting the entailed estate, he afterwards succeeds as heir of entail, he becomes fee-simple creditor in the debt, yet only represents the debtor in a limited character; accordingly, if he takes a conveyance or assignation to the debt in favour of himself and his heirs whatsoever [5] to a trustee,[6] or to a third party,[7] the *jus exigendi*. although dormant during his life or during the coincidence of the lines of succession, may afterwards emerge and be made good against subsequent heirs of entail.[8] So also a fiar may take assignation to a security over the estate to the effect of maintaining it as a subsisting burden against the liferenter.[9] On similar grounds, where the proprietor of security subjects succeeds to the fee of a bond secured thereon charged with liferent interests, and, before the liferents expire, the rights to the property and the bond are again separated, *confusio* will not take place.[10]

Subsection (4).—*Apparent Heir and Heir liable* preceptione hereditatis.

886. The operation of the principle was for the same reason excluded in the case where, under the former law, an apparent heir, or an heir liable *preceptione hereditatis*, bought in adjudications or debts affecting the ancestor's estate.[1] An unconditional discharge by the heir,[2] not accompanied by an assignation,[3] will, however, as above explained, extinguish the debt *confusione*. The same principles would seem to apply in the case of expenditure for permanent improvements chargeable against the entailed estate when paid by the heir in possession.[4] This separation of character and interest, however, finds no place (1) in the case of the interest accruing from term to term upon the debt during the heir's possession;[5] or (2) where the principal debt is redeemed, in whole or in part, from the rents of the entailed estate.[6]

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[1] *Hogg* v. *Brack*, 1832, 11 S. 199. [As to whether the presumption differs in cases of succession as opposed to cases of assignation *inter vivos*, see Ersk. iii. 4, 27, note *a*.]

[2] *Codrington* v. *Johnston's Trs.*, 1824, 2 Sh. App. 118. (This case could not arise now in view of s. 12 of 37 & 38 Vict. c. 94.)

[3] *Forbes, Hunter & Co.*, 1802, Mor. App. *voce* "Tailzie," No. 10.

[4] *Codrington, supra.*

[5] *Crawford* v. *Hotchkiss*, 11th March 1809, F.C.

[6] *Lawrie* v. *Donald & Jones*, 1830, 9 S. 147.

[7] *Welsh* v. *Barstow*, 1837, 15 S. 537.

[8] *Crawford, supra*; *Gordon* v. *Mather*, 1757, Mor. 3045, 11164; *Strathallan* v. *Drummond*, 1828, 6 S. 881, at p. 883; *Cunninghame* v. *Cardross*, 1680, Mor. 3038; *Cuming* v. *Irvine*, 1726, Mor. 3042; affd. 1 Pat. 103; *Macalister* v. *Macalister*, 1865, 4 M. 245; cf. *Burnet* v. *Burnet*, 1766, 2 Pat. 122; Stair, i. 18, 59.

[9] *Fraser* v. *Carruthers*, 1875, 2 R. 595.

[10] *Colville's Trs.* v. *Marindin*, 1908, 15 S.L.T. 26; 16 S.L.T. 197.

SUBSECTION (5).—*Cautionary Obligations.*

887. Where a principal debtor succeeds to his creditor, the principal obligation, and consequently also the accessory obligation, is extinguished *confusione*; the same result follows where the principal debtor succeeds to the cautioner who has paid the debt.[7] Where, however, the cautioner succeeds to the creditor, his accessory obligation alone is extinguished, and the cautioner may pursue the principal or co-cautioners upon the principal obligation.[8]

SUBSECTION (6).—*Heritable and Moveable Debts.*

888. If a creditor in a moveable debt succeeds as heir in heritage to the debtor,[9] or the heir in heritage succeeds to the creditor's debt by singular title, there is no proper *concursus debiti et crediti*, for the heir is only liable *subsidiarie*, the primary debtor being the executor. The same rule is applicable in the converse case where an executor acquires right to a heritable debt. Where a debtor succeeds as next-of-kin to the creditor, or *vice versa*, the point of time at which the concourse takes effect is the expiry of six months from the date of the defunct's death.[10] It would seem that sequestration or other diligence within the six months will have the effect of creating an impediment and prevent the operation of the principle.[11]

SUBSECTION (7).—*Heritable Bonds.*

889. Where the holder of a heritable bond purchases the lands over which the security is constituted, being allowed the amount of the bond out of the price at settlement, the debt is extinguished *confusione*, even although the bond remain undischarged.[1] The same result follows where a heritable proprietor disburdens the property of securities, even although an assignation be taken to the debt,[2] or where an heir buys up an adjudication during the legal.[3] But if there are adverse interests in the person of the creditor these may prevent the application of the principle, and keep the debt alive as a separate estate.[4] Where there are postponed securities, if the debtor clears off prior charges by himself or by his agent, the debt cannot be kept up to the prejudice of postponed bondholders.[5] On the other hand, where prior charges are retired by advances received from a third party, the latter is entitled to an assignation to the prior security, so as to maintain a preference over the postponed bondholders; and as this is in substance a mere transfer of security from the old to the new lender, *confusio* does not apply.[6] In such cases the presumption is that the prior charge is paid out of the new advances.[7]

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[1] *Murray* v. *Neilson & Lanirk*, 1728, Mor. 3043; *Burnet* v. *Nasmith*, 1693, Mor. 3040.

[2] *Duke of Roxburgh* v. *Wauchope*, 1825, 1 W. & S. 41.

[3] *Kerr* v. *Turnbull*, 1728, Mor. 15551.

[4] *Temple* v. *Halliday*, 1706, Mor. 15355.

[5] *Lord Blantyre* v. *Dunn*, 1858, 20 D. 1188, at p. 1195; Bell, Convey. i. p. 351.

[6] *Earl of Dalhousie* v. *Lord Hanley*, 1713, Mor. 9992; Ersk. Inst. iii. 4, 26.

[7] *Hart* v. *Hart*, 1630, Mor. 5566.

[8] Ersk. Inst. iii. 4, 26.

[9] *Johnston* v. *Ireland*, 1610, Mor. 3035.

[10] *Elder* v. *Watson*, 1859, 21 D. 1122.

[11] *Elder*, *supra*, at p. 1128. The following authorities may also be referred to on the general application of the principle: Stair, i. 18, 9; More's Stair, cxxxvi.; Bank. i. 24, 29; Ersk. Inst. iii. 4, 23–27; Prin. iii. 4, 10; Bell's Prin., s. 580; Bell, Convey. i. 350.

SUBSECTION (8).—*Landlord and Tenant.*

890. Where a landlord purchases a lease or succeeds to the tenant, or where a tenant subsequently acquires the subject let in full property, it would appear that, in both cases, the lease itself is extinguished *confusione*, and not merely each term's rent as it accrues, and other obligations *hinc inde* under the lease.[8] Accordingly, if the land is again let on similar terms, the lease is a new, not a restored contract.

SUBSECTION (9).—*Servitudes.*

891. Servitudes are extinguished *confusione* where both dominant and servient tenements fall under the same ownership.[9] The general rule is that no servitude can subsist in lands in which there is unity of ownership—*res sua nemini servit.*[10] Opinion differs as to whether a servitude thus extinguished requires constitution *de novo*, or may not *ipso facto* revive by subsequent separation of the dominant and servient tenements. Erskine's statement in favour of the former view [1] is too broadly stated, at least in cases where subsequent disunion independently of the will of the proprietor may be anticipated.[2] So in the case of lands held by the same proprietor on different titles,[3] or destined to a different series of heirs,[4] it is questionable whether servitudes are extinguished. Theoretically no doubt the servitudes are *de jure* extinguished; but if they continue *de facto* (which in the case of most real servitudes such as *oneris ferendi*, aqueduct, etc., will be sufficiently apparent), they will revive on severance of the tenements.[5] The theoretical difficulty, however, is unimportant, as the point may in most cases be solved upon the principle of implied grant.[6]

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[1] *Hogg* v. *Brack*, 1832, 11 S. 199.

[2] *Murray* v. *Parlane's Tr.*, 1890, 18 R. 287.

[3] *Balfour-Melville's Trs.* v. *Gowans*, 1896, 4 S.L.T. 111; cf. *Dennison* v. *Fea's Trs.*, 1873, 11 M. 392.

[4] *Burnet* v. *Nasmith*, 1693, Mor. 3040. See also *Ramsay* v. *Bank of Scotland*, 1729, Mor. 3383; *Robertson* v. *Davidson*, 1751, Mor. 3044; *Duke of Gordon* v. *The Crown*, 1750, Mor. 9597 at p. 9605.

[5] *Fleming* v. *Imrie*, 1868, 6 M. 363.

[6] *Mackenzie and Ors.* v. *Orr and Ors.*, 1839, Macl. & R. 117, per L. C. Cottenham at p. 123; *Love* v. *Storie*, 1863, 2 M. 22 at p. 31.

[7] *Mackenzie and Ors.* v. *Orr and Ors.*, 1837, 10 S. 311; affd. 1839, Macl. & R. 117.

[8] *Mackenzie and Ors.* v. *Orr and Ors.*, 1839, Macl. & R. 117; *Gordon* v. *Sutherland*, 1731, Mor. 1534; see Bell's Prin., s. 854.

[9] Rankine, Leases, p. 525, and cases referred to therein; compare *Lord Blantyre* v. *Dunn*, 1858, 20 D. 1188, at p. 1200.

[10] *Donaldson's Trs.* v. *Forbes*, 1839, 1 D. 449; *Carnegie* v. *MacTier*, 1844, 6 D. 1381, at p. 1390; Ersk. ii. 9, 16, 36, 37; Bell's Prin., s. 997; Rankine, Land-Ownership, p. 443; *Rentoun* v. *Home*, 1670, Mor. 3086; *Innes* v. *Stewart*, 1542, Mor. 3081. Compare *Smith* v. *Young's Trs.*, 1789, Mor. 16072. Gale, Easements, 10th ed., p. 456 *et seq.*; *The Union Bank of Scotland, Ltd.* v. *The Daily Record (Glasgow), Ltd.*, 1902, 10 S.L.T. 71.

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[1] Ersk. ii. 9, 37, *cf.* ii. 9, 16.

[2] *Donaldson's Trs.* v. *Forbes*, 1839, 1 D. 449, per Lord Moncreiff (Ordinary) at p. 452.

[3] *Preston's Trs.* v. *Preston*, 1860, 22 S. 366.

[4] *Donaldson's Trs.*, *supra.*

[5] *Walton Bros.* v. *The Lord Provost, Magistrates and Town Councillors of Glasgow*, 1876, 3 R. 1130, per Lord Pres. Inglis at p. 1133; *Carnegie* v. *MacTier*, 1844, 6 D. 1381; *Borthwick* v. *Lord Borthwick*, 1668, Mor. 96322.

[6] Rankine, Land-Ownership, p. 436. See SERVITUDES.

CONFUSION.

See PROPERTY.

CONJOINING OF ACTIONS.

See PRACTICE AND PROCEDURE.

CONJUGAL RIGHTS ACT.

See CUSTODY OF CHILDREN; DIVORCE; HUSBAND AND WIFE; TERCE.

CONJUNCT AND CONFIDENT.

See BANKRUPTCY.

CONJUNCT FEE AND LIFERENT.

See LIFERENT AND FEE; SUCCESSION.

CONJUNCT PROBATION.

See PRACTICE AND PROCEDURE.

CONJUNCT RIGHTS.

TABLE OF CONTENTS.

	PAGE		PAGE
Introduction	393	Parent and Child	395
Husband and Wife	393	Strangers	398

SECTION 1.—INTRODUCTION.

892. A right to property may be conveyed to two or more persons jointly, and the destination, which may be expressed in a variety of terms, will be given a different effect, according as the grantees are husband and wife, or parent and child, or stand in neither of these relations to each other.

SECTION 2.—HUSBAND AND WIFE.

893. Where a right is conveyed to spouses conjunctly, the general rule is that it suffers no division; and in the absence of other indication, the right is held to be in the husband only as the *dignior persona*, or, as the older jurists say, *propter eminentiam masculini sexus*. So a destination to husband and wife in conjunct fee, or in conjunct fee and liferent, vests the sole fee in the husband, the wife having merely an eventual right of liferent if she survive him.[1] A destination, however, to the spouses in conjunct liferent gives them each a right to a half.[2]

894. The substitution of "their heirs" gives a *spes successionis* to the husband's heirs only. And the substitution of children of the marriage *nominatim* to the fee gives them no more than a *spes successionis*.[3] Where the conjunct fee is given to the spouses and the longest liver or survivor of them and "their heirs," or "the heirs of the survivor," the wife, on survivance, will take the whole fee, and her heirs will succeed to the exclusion of the husband's heirs.[4] But if the substitution is not to

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GENERAL AUTHORITIES.—Stair, ii. 6, 10 ; ii. 3, 41 ; More, Notes, 175 ; Ersk. iii. 8, 35–6 ; Bell, Com. i. 54–5 ; Bell's Prin., ss. 1709, 1953 ; Bell, Convey. ii. 834 ; Fraser, H. & W. 1427 ; M'Laren on Wills, 606, 628 ; Craigie, Heritable Rights [3rd ed. 567 (Spouses) ; 535 (Parents and Children) ; 536 (Strangers)] ; Elements of Conveyancing, 199 *et seq.* ; Moveable Rights, 2nd ed., p. 435.

[1] *Laws* v. *Tod*, 1697, Mor. 4236.

[2] *Paull* v. *Forbes*, 1911 (O.H.), 1 S.L.T. 29.

[3] *Wilson* v. *Glen*, 14th December 1819, F.C. ; *Steele* v. *Young*, 1823, 2 S. 146 ; *Fisher's Trs.* v. *Fisher*, 1844, 7 D. 129 ; *Forrest* v. *Forrest*, 1863, 1 M. 806.

[4] *Fergusson* v. *M'George*, 1739, Mor. 4202 ; *Boyd* v. *King's Advocate*, 1749, Mor. 4235 ; *M'Gregor* v. *Forrester*, 1831, 9 S. 675 ; *Burrowes* v. *M'Farquhar's Trs.*, 1842, 4 D. 1484 ; see also *Knox* v. *Knox's Trs.*, 1905 (O.H.), 13 S.L.T. 406 ; *Renouf's Trs.* v. *Haining*, 1919 S.C. 497.

"their heirs," but to "the heirs of the marriage," these are the husband's heirs, and the wife's right, on survivance, does not extend beyond a liferent.[1]

895. If the conveyance shews a preference for the wife and her heirs, the fee will be in her, not in the husband.[2] The wife is also fiar where the property has come from her or her relations,[3] unless it has been given as tocher, in which case it is the evident intention that the husband should acquire it.[4] In considering whether any property is tocher, it is important to observe whether any other is given *nomine dotis*,[5] whether it is a specific sum or property, or the whole estate of the wife present and prospective, and whether it is given by her father or other relative, or conveyed by the wife herself.[6]

896. The rule *traditionibus et usucapionibus dominia transferuntur non nudis finibus* raises a strong presumption against divestiture of the fee on the part of the wife.[7] But this may be displaced by an indicated preference for the husband and his heirs.[8] That spouse's heirs are preferred which are called immediately after the heirs of the marriage: the calling of the heirs of the marriage is not such a substitution of the husband's heirs as to indicate a preference for him.[9] *In dubio* the fee is in the spouse to whom power is given to dispose of the property, but an absolute power of disposal is to be distinguished from a faculty or power of administration, such as a power of apportionment.[10]

897. The words "heirs and assignees" have been held to import a fee, since none but a fiar can assign.[11] On the other hand, an unlimited power to borrow on the property is not equivalent to a power of disposal.[12] A conveyance in conjunct liferent may be construed as a fee where an absolute power of disposal is reserved; and a destination in conjunct fee and liferent will be read as giving only a liferent, if such an intention be apparent in the deed.[13] This construction is reached by writing exegetically the adverb "fiduciarie" after the words "conjunct fee."[1] The words "for his (or her) liferent use allenarly (or only)" will display an intention so to limit the grant, but such an expression as "during all the days of his lifetime" is not taxative.[2] An exclusion of the husband's creditors will indicate an intention to give him only a liferent, although the destination is sufficient to confer a fee.[3]

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[1] *Neilson* v. *Murray*, 1732, 1 Pat. App. 65; *Mackellar* v. *Marquis*, 1840, 3 D. 172; *Madden* v. *Currie's Trs.*, 1842, 4 D. 749.

[2] *Murray* v. *Blair*, 1739, 1 Pat. App. 251; *Sinclair* v. *Anderson*, 1771, Mor. 4241; *Cameron* v. *Young*, 1837, 15 S. 1205; *Smith Cunninghame* v. *Anstruther's Trs.*, 1869, 7 M. 689.

[3] *Murray* v. *Blair*, *supra*; *Wordie* v. *Sampson*, 1750, Mor. 4207; *Sinclair* v. *Anderson*, *supra*; *Paterson* v. *Balfour*, 1780, Mor. 4212; *Muirhead* v. *Paterson*, 1824, 2 S. 525; *Myles* v. *Calman*, 1857, 19 D. 408; *Smith Cunninghame* v. *Anstruther's Trs.*, *supra*; *Brough* v. *Adamson*, 1887, 14 R. 858.

[4] *Graham* v. *Park*, 1639, Mor. 4226; *Gairns* v. *Sandiland*, 1671, Mor. 4230; *Ramsay* v. *Ramsay*, 1682, Mor. 4234; *Northsenton's Crs.* v. *Eliot*, 1720, Mor. 4244; *Bruce-Henderson* v. *Henderson*, 1790, Mor. 4215.

[5] *Paterson* v. *Balfour*, *supra*.

[6] *Smith Cunninghame* v. *Anstruther's Trs.*, *supra*.

[7] *Grays* v. *John Wood and Ors.*, 1773, Mor. 4210; *Dewar* v. *M'Kinnon*, 1825, 1 W. & S. 161.

[8] *Erneslaw's Crs.* v. *Douglases*, 1705, Mor. 4223.

[9] *Ramsay* v. *Maxwell*, 1612, Mor. 4226; *Myles* v. *Calman*, *supra*.

[10] *Earl of Dunfermline* v. *Earl of Callender*, 1676, Mor. 4244.

[11] *Fead* v. *Maxwell*, 1709, Mor. 4240.

[12] *Boustead* v. *Gardner*, 1879, 7 R. 139.

[13] *Pringle's Crs.* v. *Erskine*, 1714, Mor. 4261; *Watherstone* v. *Rentons*, 1801, Mor. 4297; *Rollo* v. *Ramsay*, 1832, 11 S. 132; *M'Gowan* v. *Robb*, 1862, 2 M. 943; *Bryson* v. *Watson*, 1893, 20 R. 986.

898. Where property coming from a wife was destined to herself and husband in conjunct fee and liferent, for their liferent use allenarly, and to the children of the marriage in fee, the wife was held, failing children of the marriage, to be undivested fiar.[4] Under a destination to husband and wife in conjunct fee and liferent, and to the longest liver, and to the heirs of the marriage, whom failing, one-half to the heirs of the husband and the other half to the heirs of the wife, a surviving wife was found entitled, failing children of the marriage, to the liferent of the whole and the fee of one-half.[5] A conjunct liferent to spouses will not import a fee in either, unless that is required by the subsequent terms of the destination to prevent the fee being *in pendente.*[6] Where spouses enjoy a joint liferent, the right of the wife will be in abeyance during her husband's life, but is indefeasible at his instance.[7]

899. Where the subject of the conveyance does not consist of *feuda* or *quasi-feuda*, a more literal interpretation has been given to the destination, on the ground that there was no reason for maintaining the right in an undivided condition.[8]

SECTION 3.—PARENT AND CHILD.

900. A destination to a parent in liferent and his children *nascituri* or unnamed in fee, is construed as giving a full right of fee to the parent. The children have only a *spes successionis.*[9] This rule is founded on a combination of two principles, neither of which alone sufficiently accounts for it. These are the presumed intention of the granter of the deed, and the feudal maxim that a fee cannot be *in pendente.*

901. Had the later doctrine of a fiduciary fee been invented at the time *Frog's Crs.* was decided, it is possible that the rule would never have come into being. The rule, however, is now too firmly established to be displaced except by legislation.[10] The position of the rule was defined by Lord President Inglis in *Cumstie's Trs.* v. *Cumstie*[11] as follows: "It is applicable to a case where no more is said than that the conveyance is made to the parent in liferent and to the children *nascituri* in fee; but it is not applicable to any other case whatever." The view that the rule is limited to destinations to children *nascituri* is contrary to several decisions to the effect that the rule holds whether the fee is destined to the whole children procreated or to be procreated, or to one of them, *e.g.* to the heir-male,[1] and whether or not all or any of them be alive at the time when the grant takes effect.[2] The view that the rule applies whether the children are in existence or not has the assent of Lord Dundas in the case of *Brash's Trs.* v. *Phillipson*,[3] but not apparently of the Lord Justice-Clerk. It is equally applicable to a conveyance of a heritage and of moveables. A disposition to a parent and children in equal proportions, with a substitution failing them, also gives the sole fee to the parent.[4] The present attitude of the Court is that the rule will not be carried one inch further than it has already been carried.[5]

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[1] *Devlin* v. *Lowrie*, 1922 S.C. 255.

[2] *Wilson* v. *Glen*, 14th December 1819, F.C.

[3] *Young* v. *Watson*, 1835, 14 S. 85.

[4] *Reid* v. *Reid*, 1827, 6 S. 198.

[5] *Purdie* v. *Ross*, 1707, Mor. 4238; *Madden* v. *Currie's Trs.*, 1842, 4 D. 749.

[6] *Thomsons* v. *Lawsons*, 1681, Mor. 4258; *Sivright* v. *Dallas*, 1824, 2 S. 543; *Mackellar* v. *Marquis*, 1840, 3 D. 172.

[7] *Thom* v. *Thom*, 1852, 14 D. 861.

[8] *Bartilmo* v. *Hassington*, 1632 Mor. 4222.

[9] *Frog's Crs.* v. *His Children*, 1735, Mor. 4262; *Children and Grand-children of David Lindsay* v. *Dott*, 1807, Mor. *voce* "Fiar," App. 1; *Williamson* v. *Cochrane & Paterson*, 1826, 6 S. 1035.

[10] *Lockhart's Trs.* v. *Lockhart*, 1921 S.C. 761.

[11] 1876, 3 R. 921, at p. 942.

902. The parent's right may be restricted to a liferent by the use of some such taxative expression as "for liferent allenarly (or only)," or by some clear indication that the intention is to convey no more.[6] The words "for liferent alimentary," coupled with a power of division of the fee among children, have been held sufficient to exclude a fee in the parent;[7] but a mere declaration that a bequest is alimentary does not seem to have that effect.[8] A limitation to a liferent may be imposed by excluding the parent's creditors,[9] or by directing the interest to be paid to the parent in liferent, and the property or principal sum to the children.[10] But the limiting words must clearly restrict the right of the parent, and not amount merely to the expression of a wish on the part of the granter of the deed.[11] If the restriction be definite and certain, the parent is entitled to a liferent only; but he is also vested with a fiduciary fee for the children, which, however, will give him no more power over the subject than a liferent. A beneficial interest as disponee, not as heir, vests in each child at birth, and transmits to his representatives.[12]

903. Where the children are called *nominatim* to a fee, or where the fee is destined to one or more *nominatim*, and others to be born, the right of the parent is to a bare liferent.[13] In the latter case, the fee is vested in the children named, for themselves and as trustees for those to be born.[1] In a conveyance to a person in liferent for liferent use allenarly, and one-half to her children in fee, the fee of the other half to a stranger, who, failing issue of the liferentrix, was to have the fee of the whole, it was held that the whole fee vested in the stranger, subject to defeasance to the extent of one-half on issue being born to the liferentrix.[2] But where the ultimate fiars cannot be ascertained till the death of the liferenter, or the dissolution of the marriage, the fiduciary fee is in the parent, not in the children named,[3] the latter having a *jus quæsitum* to prevent their contingent rights being prejudiced.[4]

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[1] *Dewar* v. *M‘Kinnon*, 1825, 1 W. & S. 161.

[2] *Porterfield* v. *Graham*, 1779, Mor. 4277; *M‘Donald* v. *M‘Lachlans*, 1831, 9 S. 269; *Ferguson's Trs.* v. *Hamilton*, 1860, 22 D. 1442; affd. 24 D. (H.L.) 18; *M‘Clymont's Exrs.* v. *Osborne*, 1895, 22 R. 411.

[3] *Brash's Trs.* v. *Phillipson*, 1916 S.C. 271, at 274.

[4] *Edward* v. *Shiell*, 1840, 10 D. 685.

[5] *Gifford's Trs.* v. *Gifford*, 1903, 5 F. 723, at 734; *Brash's Trs.* v. *Phillipson, supra.*

[6] *Newlands* v. *His Creditors*, 1794, Mor. 4289; *Harvey* v. *Donald*, 26th May 1815, F.C.; *Miller* v. *Miller*, 1833, 12 S. 31; *Lockhart's Trs.* v. *Lockhart*, 1921 S.C. 761.

[7] *Gerran* v. *Alexander*, 1781, Mor. 4402.

[8] *Hutton's Trs.* v. *Hutton*, 1847, 9 D. 639; *Gibson's Trs.* v. *Ross*, 1877, 4 R. 1038.

[9] *Douglas* v. *Sharpe*, 1811, Hume 173.

[10] *Bushby* v. *Rennie*, 1825, 4 S. 110; *Scott* v. *Crombie*, 1826, 4 S. 456; affd. 2 W. & S. 550; *Dawson* v. *Dawson*, 1877, 4 R. 597.

[11] *Alexander* v. *Alexander*, 1849, 12 D. 345 and 348; *Houston or Mitchell* v. *Mitchell*, 1877, 5 R. 154.

[12] *Dundas* v. *Dundas*, 1823, 2 S. 145; *Douglas* v. *Thomson*, 1870, 8 M. 374.

[13] *M‘Intosh* v. *M‘Intosh*, 28th January 1812, F.C.

904. A conveyance by one spouse to the other in liferent and the children in fee, has been held to leave the granter undivested fiar.[5] It has been doubted, however, whether there can be said to be an established rule to the effect that the rule of *Frog's Crs.* has no application to conveyances or destinations flowing from one spouse to another.[6] If, in a destination to the children in fee, a liferent only has been reserved to the parent, coupled with a power of absolute disposal, this power has the effect of converting the reserved liferent into a fee.[7]

905. The most common method of limiting the right of the parent to a liferent is by the intervention of a trust; but the constitution of a trust has no such effect if it exist merely for the purpose of conveying or transferring the property of the truster to the beneficiaries. Directions to pay, or to dispone and convey, indicate that this is its nature.[8] A continuing trust must be established, in which a duty is imposed of retaining and managing the estate for behoof of those interested, and for the protection of their rights.[9]

906. It does not follow, from the rule by which a disposition *ex figura verborum* of a liferent is construed as a conveyance of a fee, that the parent is vested with an absolute right over the subject. Where the grant is by marriage contract or testamentary settlement, the fee may be so qualified as to protect the interests of the children, and prevent its disposal to their prejudice.[10] It often happens that a testator makes a provision of the liferent of property to a child, to be accepted in lieu of legitim, the fee being destined to such child's issue. If legitim be claimed, the liferent only is forfeited, not the fee,[1] unless there be a forfeiture clause sufficiently wide in its terms to include the fee also.[2] If the bequest be to the grandchildren solely, no provision being left to their parent, the rights of the grantees will not come within the scope of a general forfeiture clause.[3]

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[1] *Dykes* v. *Boyd*, 3rd June 1813, F.C.

[2] *Martin's Trs.* v. *Milliken*, 1864, 3 M. 326; *Cumming's Trs.* v. *Anderson*, 1895, 23 R. 94.

[3] *M'Gowan* v. *Robb*, 1864, 2 M. 943; *Snell* v. *White*, 1872, 10 M. 745.

[4] *M'Gowan* v. *Robb*, 1862, 1 M. 141.

[5] *Veitch* v. *Robertson*, 1630, Mor. 4256; *Fraser* v. *Brown*, 1707, Mor. 4259; *Turnbull* v. *Turnbull's Trs.*, 1822, 2 S. 1; *Findlay* v. *M'Intyre*, 1849, 12 D. 325.

[6] *Mackellar* v. *Marquis*, 1840, 3 D. 172; *Lockhart's Trs.* v. *Lockhart*, 1921 S.C. at p. 772.

[7] *Dickson* v. *Dickson*, 1780, Mor. 4269; *Wilson* v. *Glen*, 14th Dec. 1819, F.C.; *Turnbull*, *supra*.

[8] *Robertson* v. *Duke of Athole*, 1806, Mor. *voce* "Fiar," App. 2; *Hutton's Trs.* v. *Hutton*, *supra*; *Ferguson's Trs.* v. *Hamilton*, 1860, 22 D. 1442; *Massy* v. *Scott's Trs.*, 1872, 11 M. 173; *Gibson's Trs.* v. *Ross*, *supra*; *Beveridges* v. *Beveridges' Trs.*, 1878, 5 R. 1116; *Mearns* v. *Charles*, (O.H.), 1926 S.L.T. 118.

[9] *Bushby* v. *Rennie*, 1825, 4 S. 110; *Mein* v. *Taylor*, 1827, 5 S. 727; affd. 4 W. & S. 22; *Ewan* v. *Watt*, 1828, 6 S. 1125; *Ross* v. *King*, 1847, 9 D. 1327; *Hutchison* v. *Anderson's Trs.*, 1853, 15 D. 570.

[10] *Gordon* v. *Mackintosh*, 1841, 4 D. 192; affd. 4 Bell's App. 105; *Massy* v. *Scott's Trs.*, *supra*; *Gibson's Trs.* v. *Ross*, *supra*; *Bradford* v. *Young*, 1884, 11 R. 1135.

SECTION 4.—STRANGERS.

907. A conveyance to two or more persons in conjunct fee, or jointly, and their heirs and assignees, gives to each a *pro indiviso* share, descending at death to his own heirs.[4] The additional mention of a liferent, *e.g.* to A. and B. in conjunct fee and liferent, gives to the survivor a liferent of the share of the predeceaser, indefeasible by the latter. Where, however, an uncle disponed to two nieces A. and B. in conjunct fee and liferent for their alimentary liferent use allenarly and the heirs of the survivor, it was held that the doctrine of *Newlands* v. *Newlands Crs.*[5] applied to strangers to the effect of giving the surviving niece a fiduciary fee for her heirs.[6] If the destination be to two persons and the survivor (or longest liver) and his (or their) heirs, the fee of the whole will, on the death of one, pass to the survivor.[7] But the share of the predeceaser will be attachable by his creditors, and may be burdened or disponed by his deed either *inter vivos* or *mortis causa*. If only the liferent be given jointly, and the fee be destined to one and his heirs, that one is sole fiar; but the survivor will have a right of liferent in the share of the predeceaser if the liferent be given to two persons and the longest liver or survivor. An eventual right to the whole may be given to one conditionally on survivance, *e.g.* to A. and B. in conjunct fee (and liferent), and to B. if he survive. If B. do not survive, A. and B.'s heirs divide the property, A. having a liferent of B.'s share if the words "and liferent" be introduced. During their joint lives each may dispose of his *pro indiviso* half as he pleases.

908. Liferent and fee may be distinguished in the destination, *e.g.* to A. and B. and the survivor in liferent, or to A. and B. in conjunct liferent, and to C. and D. in fee. The survivor of A. and B. will have a liferent of the whole, the fee eventually dividing between the heirs of C. and D. If in this case the liferent had merely been given equally to A. and B., no right in the share of one would, on his death, pass to the other.

909. All the above general rules are subject to modification, according to the exigencies of the particular case, the dominant principle being to ascertain the intention of the granter of the deed.

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[1] *Ewan* v. *Watt*, 1828, 6 S. 1125; *Fisher* v. *Dixon*, 1833, 10 S. 55; affd. 6 W. & S. 431; *Collier* v. *Collier*, 11 S. 912; *Jack* v. *Marshall*, 1879, 6 R. 543.

[2] *Wilson* v. *Gibson*, 1840, 2 D. 1236; *Campbell's Trs.* v. *Campbell*, 1889, 16 R. 1007.

[3] *Earl of Kintore* v. *Countess Dowager of Kintore*, 1884, 11 R. 1013; affd. 13 R. (H.L.) 93; *Urie's Trs.* v. *Urie*, 1896, 23 R. 865.

[4] *Johnston*, 1899, 1 F. 720.

[5] 1794, Mor. 4289.

[6] *Devlin* v. *Lowrie*, 1922 S.C. 255.

[7] *Bisset* v. *Walker*, 1799, Mor. *voce* "Deathbed," App. Part I. No. 2.

CONJUNCTLY AND SEVERALLY.

See CAUTIONARY OBLIGATIONS; OBLIGATION; RELIEF.

CONNIVANCE.

See DIVORCE.

CONQUEST.

TABLE OF CONTENTS.

	PAGE		PAGE
Conquest in Heritable Succession	400	Conquest in Marriage-Contract Provisions	402
Effect of Conveyancing Act, 1874	400	Clauses in Ordinary Form	402
The Old Law: Introductory	400	Clauses in Special Form	404
Fees of Conquest	400		
Heirs of Conquest	401		
Destinations to Heirs	402		

SECTION 1.—CONQUEST IN HERITABLE SUCCESSION.

SUBSECTION (1).—*Effect of Conveyancing Act*, 1874.

910. The Conveyancing (Scotland) Act, 1874, abolished the distinction between fees of heritage and fees of conquest with respect to all successions opening after 1st October 1874, so that fees of conquest now descend to the same persons in the same manner and subject to the same rules as fees of heritage.[1] Likewise a husband's right of courtesy now extends to his wife's conquest as well as to her proper heritage.[2] The former distinction requires, however, to be kept in view in the examination of titles in successions which opened before the date mentioned; in this connection it cannot yet be assumed to have lost all practical importance.

SUBSECTION (2).—*The Old Law: Introductory.*

911. Under the old law, heritable property for purposes of succession required to be distinguished as heritage or conquest; for on intestacy heritage passed to the heir of line, and conquest to the heir of conquest; and even where the same person was both heir of line and heir of conquest the distinction determined the character in which the heir was to be served; while if the heirs were called to the succession under a destination, or if the succession opened to the heirs of another, the same distinction determined, or helped to determine, which heir was indicated. These considerations make it convenient to discuss three questions: (1) What were fees of conquest? (2) Who were heirs of conquest? (3) What were the rules when heirs were called to the succession under destinations?

SUBSECTION (3).—*Fees of Conquest.*

912. The distinction between heritage and conquest [3] had its origin in an ancient division of fees into *antiqua* and *nova*. The old fees, or fees of heritage, were those to which a person succeeded as heir, whether as heir of line or as heir of conquest [1] or as heir of provision; [2] the new fees, or fees of conquest, were those acquired by purchase, gift, or other singular title from a stranger to whom the acquirer would not have succeeded by law. Conquest only embraced subjects a title to which had been or required to be completed by infeftment. So titles of honour, leases,[3] pensions and personal bonds secluding executors [4] passed with the heritage to the heir of line. But the heir of conquest might take lands,[5] bonds and dispositions in security, heritable bonds,[6] annualrents,[7] appraisings,[8] adjudications,[5] rights to heritable property standing in third parties' persons in trust although without a written acknowledgment of trust,[5] and heritable rights under trust-dispositions.[9] A share of collated heritage does not come to the recipient by succession, and accordingly would ordinarily have been accounted conquest; but where the subject of collation was a real burden, the right of a deceased to a share thereof, not being a feudal subject capable of infeftment, passed to the heir of line.[10] The question whether teinds could be included in conquest has not been decided. In one case [11] it was held that they passed to the heir of line, but the reason seems to have been that the teinds in question followed the lands which in that case passed to the heir of line.

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[1] 37 & 38 Vict. c. 94, s. 37.

[2] *Walker* v. *Walker's Trs.*, 1917 S.C. 46.

[3] Ersk. Inst. iii. 8, 14–16; Bell's Prin., ss. 1670–76; M'Laren, Wills and Succession, p. 81.

SUBSECTION (4).—*Heirs of Conquest.*

913. The only occasions when the line of succession to conquest differed from the line of succession to heritage were when the nearest of kin of the deceased were older and younger brothers (or their issue), or uncles older and younger than the father of the deceased (or the issue of such uncles). The younger brother or uncle took the heritage; the elder took the conquest; and there was representation as in heritage. In all other cases the heirs of conquest were the same persons as the heirs of line; *e.g.* sisters took as heirs portioners,[12] and if the youngest brother of a family died, the immediate elder brother took both heritage and conquest.[13] Further, in conquest as in heritage, the whole blood excluded the half; but if there were no brothers or sisters german, the rule held as to brothers consanguinean.[14] This anomalous doctrine is supposed by Erskine to have been introduced with a view of enriching elder brothers who, he says, have always been more favoured by our law than the younger. But this would hardly square with the fact that, where the deceased left two or more brothers older than himself, the conquest passed, as already stated, to the immediate elder brother and not to the eldest of the family; and conquest ascended but once, for in the person of the heir of conquest it became heritage as soon as he had completed his title; though if he died without completing a title it passed on his death to the next heir of conquest of the ancestor.[1]

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[1] *Aitchison* v. *Aitchison*, 1829, 7 S. 558. [2] *Boyd* v. *Boyd*, 1774, Mor. 3070.

[3] *Heirs of Earl of Dunbar*, 1625, Mor. 5605; *Ferguson* v. *Ferguson*, 1663, Mor. 5605.

[4] *Duke of Hamilton* v. *Earl of Selkirk*, 1740, Mor. 5615; *Begbie* v. *Begbie*, 1706, Mor. 5609.

[5] *Duke of Hamilton, supra.*

[6] *Duke of Hamilton, supra; A.* v. *B.*, 1676, Mor. 5608; *Creditors of Menzies* v. *Menzies*, 738, Mor. 5614.

[7] *Robertson* v. *Lord Halkerton*, 1675, Mor. 5605.

[8] *A.* v. *B., supra; Anderson* v. *Anderson*, 1677, Mor. 5609.

[9] *Brown* v. *Campbell*, 1855, 17 D. 759.

[10] *Napier* v. *Orr*, 1868, 6 M. 264. [11] *Greenock* v. *Greenock*, 1736, Mor. 5612.

[12] *Carse* v. *Russel*, 1717, Mor. 14873. [13] *Grant* v. *Grant*, 1757, Mor. 14874.

[14] *Lady Clerkington* v. *Stewart*, 1664, Mor. 14867.

SUBSECTION (5).—*Destinations to Heirs.*

914. The heir of conquest might succeed not only on intestacy but also under a destination in which the heirs called might be the heirs of the granter of the destination, or the heirs of a disponee or other person nominated in the disposition; and they might take as conditional institutes or as substitutes. In each case the term "heir" was open to construction. From the decided cases the general rule can be deduced that the heir of conquest only succeeded if he was to be the immediate successor of his own ancestor and the property was conquest in the ancestor's person; that is to say, if a destination in the events which happened merely expressed the legal order of succession and said that the property was to pass from A to the heirs of A, then the nature of the property determined, as in intestacy, whether the heir of conquest or the heir of line was to be preferred; while if the destination passed the property from A to the heirs of any other person, the heir of line was always indicated. Thus the heir of conquest might succeed when the succession opened to the heir of the granter of the destination as conditional institute,[2] or to the heir of the institute as first substitute.[3] But the heir of conquest could never succeed when the succession opened to the heir of the granter as substitute [4] (because the property having vested in an institute could not be conquest of the granter), or to the heir of a disponee as conditional institute [5] (because the property would not have vested in the disponee so as to be conquest in his person), or to the heir of either granter or disponee as second or later substitute [6] (because the property would have vested as heritage in the person of the previous substitute as heir of provision.)

SECTION 2.—CONQUEST IN MARRIAGE-CONTRACT PROVISIONS.

SUBSECTION (1).—*Clauses in Ordinary Form.*

915. A provision of conquest [7] in a marriage contract was an ancient mode by which the husband settled on his wife and children the whole, or part, of the property heritable and moveable which might be conquest and acquired during the marriage. The clause of conquest has been productive of much litigation and has fallen into disfavour because of the uncertainty and insecurity of such a provision. There was no conveyance to trustees; the husband remained unlimited proprietor of the conquest, subject to the single qualification that he could not gratuitously disappoint the right of succession conferred upon his wife and children;[1] and no claim lay against him during his life.[2]

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[1] *Aitchison* v. *Aitchison*, 1829, 7 S. 558.

[2] *Robison* v. *Robison*, 1859, 21 D. 905. (Opinions.)

[3] *Boyd* v. *Boyd*, 1774, Mor. 3070; *Brown* v. *Campbell*, 1855, 17 D. 759.

[4] *Boyd* v. *Boyd*, *supra*; *Robison* v. *Robison*, *supra*.

[5] *Miller* v. *Miller*, 1831, 9 S. 295; 7 W. & S. 1.

[6] *Mackintosh* v. *Ross*, 1873, 11 M. 636.

[7] Ersk. Inst. iii. 8, 43; Bell's Prin., ss. 1974–77; Fraser, H. & W., p. 1338.

916. Conquest in marriage-contract provisions differed from conquest in heritable succession in respect that it embraced moveable as well as heritable property. It has been defined as "every profitable addition to the goods in communion, or to the heritable estate of the husband, which does not come by succession."[3] It did not include legacies to either spouse,[4] and it is doubtful whether it included donations,[5] but it included what the husband acquired *jure mariti*.[6] Subject to the qualifications mentioned it was the difference between the inventory or amount of the general estate of the spouses when the marriage took place and that which appeared at the dissolution of the marriage.[7] Accordingly mere conversion of the estate from moveable to heritable, or *vice versa* (which affected the amount of the conquest in questions of heritable succession) had no effect on the amount of the marriage-contract provision.

917. Although not available until the husband's death, the conquest was calculated as at the dissolution of the marriage, by deducting from the estate then existing the husband's debts and prior obligations[8] and the original estate. To facilitate this calculation the contract frequently contained a statement of the amount of the estate at the date of the marriage; and where such a statement was incorporated in the contract of a second marriage it was necessary to explain clearly whether provisions to the family of the first marriage were to be payable out of the amount so reserved; otherwise such provisions formed additional deductions in ascertaining the conquest of the second marriage.[9] Similarly, where the provision of conquest was combined with a provision of a definite amount, it might be a question whether the definite sum fell to be deducted in ascertaining the conquest.[10]

918. The husband had wide powers in dealing with the conquest. An obligation of conquest was regarded as little better than a simple destination. Where the husband had no funds out of which to make reasonable provision for a second wife and family, he might make such provision for them out of the conquest of the first marriage.[11] Further, he had an inherent power of allocating the conquest as he pleased among his children, provided he did not totally exclude any of them from a share.[1] If no allocation was made the children took equal shares, and if one child had discharged his claim this did not increase the shares of the others.[2]

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[1] *Diggens* v. *Gordon*, 1865, 3 M. 609; 5 M. (H.L.) 75; *Champion* v. *Duncan*, 1867, 6 M. 17.

[2] *Simpson* v. *Anderson*, 1684, Mor. 12960; *Johnston* v. *Cruikshanks*, 1685, Mor. 12964.

[3] *Diggens, supra*, per Lord Justice Clerk Inglis.

[4] *Mercer* v. *Mercer*, 1730, Mor. 3054; *Rae* v. *Rae*, 23rd January 1810, F.C.

[5] *Diggens, supra*, per Lord Cowan; see Fraser, H. & W., p. 1339.

[6] *Diggens, supra*; *Rae, supra*.

[7] *Diggens, supra*, per Lord Neaves.

[8] *Hunter's Trs.* v. *Macan*, 1839, 1 D. 817.

[9] *Fraser* v. *Fraser*, 1687, Mor. 12896.

[10] *Beattie* v. *Roxburgh*, 1672, Mor. 3067.

[11] *Arthur and Seymour* v. *Lamb*, 1870, 8 M. 928.

SUBSECTION (2).—*Clauses in Special Form.*

919. Sometimes the parties, instead of confining themselves to a simple provision of conquest, described what the conquest was to include. In such a case the clause was strictly interpreted. Thus a provision of conquest of lands and heritages did not include leases; [3] lands, teinds, annual rents, etc., not mentioning sums of money, did not include the annual rent of moveable sums; [4] and goods and gear did not include houses.[5] Again, the parties might extend the scope of the clause so as to include what came by succession; an example of this is to be found in the style book.[6]

920. Where a husband bound himself to provide half of the conquest "to himself for the use and behoof of the children"—an unusual destination—the Court held that he had constituted himself a trustee for the children, and that, after the mother's death, action was competent to the only child of the marriage during the father's lifetime.[7] Similarly, where the husband bound himself to take the rights and securities of a *universitas*, which included the conquest, to himself and his wife "in conjunct fee and liferent allenarly," it was held that he was bound to account even during the subsistence of the marriage.[8]

921. The rules of conquest are not applicable to the provisions made by wives in marriage contracts by conveyance to trustees. Where a wife conveyed to trustees the property which she might conquest or acquire during the marriage, the Court, founding partly on the fact of a conveyance to trustees and partly on the fact that a wife could have no conquest in the technical sense, held that the conveyance was not a proper provision of conquest and that on a construction of the contract it embraced property acquired by succession.[9]

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[1] *Dowie* v. *Dowie*, 1728, Mor. 13004; *Campbell* v. *Campbell*, 1738, Mor. 13004.

[2] *Sinclair* v. *Sinclair*, 1770, 2 Pat. 199.

[3] *Lady Dunfermling* v. *Earl of Dunfermling*, 1628, Mor. 3048.

[4] *Aitkin*, 1682, Mor. 3053.

[5] *Young and Chalmers* v. *Young and Macky*, 1696, Mor. 3054.

[6] Juridical Styles, vol. ii. p. 500.

[7] *Gibson* v. *Arbuthnot*, 1726, Mor. 11481.

[8] *Nicolson* v. *Nicolson* (O.H.), 1899, 6 S.L.T. 322.

[9] *Diggens* v. *Gordon*, 1865, 3 M. 609; 5 M. (H.L.) 75.

CONSANGUINEAN.

See KINSHIP; SUCCESSION.

CONSENSUS IN IDEM.

CONSENT.

See CONTRACT; ERROR; FRAUD AND MISREPRESENTATION.

CONSENSUS TOLLIT ERROREM.

See MAXIMS.

CONSENTER.

See DISPOSITION.

CONSIDERATION.

See BILL OF EXCHANGE; CONTRACT; OBLIGATION.

CONSIGNATION.

See BILL CHAMBER; COMPULSORY PURCHASE; DEPOSIT; ENTAIL.

CONSIGNMENT.

See AGENCY; CARRIAGE BY LAND; CARRIAGE BY SEA; FACTORS ACTS; SALE.

CONSISTORIAL ACTION.

See ACTION; ADHERENCE; ALIMENT; DIVORCE; JUDICIAL SEPARATION; MARRIAGE.

CONSOLIDATED FUND.

See NATIONAL FINANCE.

CONSOLIDATION.

TABLE OF CONTENTS.

	PAGE		PAGE
Introductory	407	Effects of Consolidation (*contd.*)—	
Consolidation by Resignation	408	Destination	412
Consolidation by Prescription	409	Double Superiority Titles	412
Consolidation by Minute	410	Heritage and Conquest	413
Effects of Consolidation	411	Entailed Superiority	413
Title	411	The Over-Superior's Position	413

SECTION 1.—INTRODUCTORY.

922. Consolidation is the term used in feudal conveyancing to describe the union of two separate estates in the same lands. The union is effected in strict accordance with the rules of the feudal system by the process of resignation or surrender or giving back by the vassal of his fee into the hands of the proprietor of the superior right, there to remain for ever, so that the inferior right is united or merged with the right of superiority in all time. As will be noted later, the Conveyancing Act of 1924 in extending the methods of consolidation departs in a measure from the strict rule of resignation. The two estates must be in immediate sequence in the feudal chain; but, so long as that condition is observed, the process applies not only to the *dominium utile* and the immediate superiority thereof, but also to any two estates of superiority or mid-superiority.[1]

923. It was at one time thought that, when the two fees came to be vested in one person, consolidation operated automatically. Indeed, when it was the case of the superior acquiring the vassal's property by succession, it was thought that he did not require even to make up any title as heir. The *dominium utile*, being regarded as a mere burden on the right of superiority, seems to have been considered as extinguished *confusione*. When the uses of the Registers became more apparent, conveyancers came to entertain the opinion that the two fees of property and superiority were distinct estates, and in 1786 it was authoritatively settled that consolidation could not take place *ipso jure*, but that the two fees remained distinct until consolidation was effected by resignation *ad remanentiam*.[2]

Until 1874, consolidation might be effected in either of two ways: (1) resignation *ad remanentiam*, and (2) prescription.

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[1] The Conveyancing (Scotland) Act, 1874, s. 6, and the Conveyancing (Scotland) Act, 1924, s. 11.

[2] *Bald* v. *Buchanan*, 1786, Mor. 15084; affd. 1787, Mor. 15089.

SECTION 2.—CONSOLIDATION BY RESIGNATION.

924. It was essential that the titles both of superior and vassal should be complete. If the superior purchased the property, the original form of deed was a procuratory of resignation *ad remanentiam*, followed by an instrument of resignation *ad remanentiam*. From their infrequency in practice, instruments of resignation *ad remanentiam* were omitted at the establishment of the public registers in the year 1617, but by the Act of 1669, c. 3, they were ordered to be registered in the same way as sasines, under the pain of nullity. Down to 1845 there was a ceremony of resignation by the vassal or his procurator in presence of the superior or his commissioner before a notary public and two witnesses. The proper symbols of resignation are "staff and baton," but by custom a pen was used to represent these symbols in the act of resignation. The 1845 Act authorised the superior's known agent to receive resignations, and the long notarial docquet was abolished in the instrument.[1] The instrument was further simplified by the 1858 Act,[2] which also permitted registration at any time within the lifetime of the person in whose favour the resignation was made. Further, the Act made the use of the instrument optional.

925. An alternative to the procuratory of resignation was a disposition of the property, with a clause of resignation *ad remanentiam*. The deed contained no obligation to infeft and no precept of sasine. Its peculiarity was the special clause of resignation *ad perpetuam remanentiam*. The 1847 Act [3] introduced the short clause of resignation in the words "and I resign the said lands and others for new infeftment," which were to be held, "in the case of conveyances by a vassal to his superior, as equivalent to a procuratory of resignation *ad remanentiam*." This was altered by the 1858 Act,[2] which (s. 5) provided that the clause of resignation should be held to import a resignation *in favorem* only, unless specially expressed to be a resignation *ad remanentiam*; but, to avoid difficulty as to indefinite resignations contained in dispositions executed between 1847 and 1858, it was provided that these should form a good warrant for an instrument of resignation *ad remanentiam*. It is to be understood that down to 1858 the disposition with clause of resignation *ad remanentiam* (express or implied) required to be followed by an instrument, just as was the case when a separate procuratory was used.

926. The Act of 1858 (s. 4) declared it unnecessary to expede an instrument of resignation *ad remanentiam*, and allowed the procuratory of resignation *ad remanentiam*, or disposition with clause of resignation expressly *ad remanentiam*, to be recorded with a warrant. A notarial instrument was allowed as a substitute, if desired.[4] The disposition with clause of resignation was most appropriate when the superior purchased the property from the vassal. In the converse case the vassal obtained an ordinary disposition of the superiority, completed his title thereto, and could thereupon proceed to grant in his own favour either a disposition of the property with clause of resignation *ad remanentiam*, or a separate procuratory of resignation *ad remanentiam*; but the latter was the more appropriate, as it was also when the right of either was acquired by succession. It is to be understood that neither was the disposition confined to cases where two persons were involved, nor the separate procuratory to cases where there was only one.

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[1] The Infeftment Act, 1845 (8 & 9 Vict. c. 35), s. 8.

[2] The Titles to Land (Scotland) Act, 1858 (21 & 22 Vict. c. 76), Schedule D.

[3] The Lands Transference Act, 1847 (10 & 11 Vict. c. 48), s. 3, Schedule A.

[4] The Titles to Land (Scotland) Act, 1858 (21 & 22 Vict. c. 76).

927. After the passing of the Conveyancing Act of 1874 it was suggested that, in consequence of the consolidation by minute thereby introduced, consolidation by resignation became incompetent. The Conveyancing Act of 1924 now makes it clear that consolidation by resignation was and is competent, and that when an infeft superior acquires the property or mid-superiority and the disposition in his favour contains a clause of resignation *ad perpetuam remanentiam* the recording of the disposition shall effect consolidation.[1]

SECTION 3.—CONSOLIDATION BY PRESCRIPTION.

928. This expression is used in different senses. It may mean either the acquisition by the superior, by force of prescriptive possession, of the *dominium utile*, and the incorporation thereof with the superiority estate, or simply the consolidation of two fees separately vested in the same person. There is also a case between these two, viz. where, though both fees belonged at the commencement of the prescriptive period to the same person, he held one on an absolute and the other on a limited title. In that case he represents two interests in his own person, and there is thus room not only for consolidation, but also for *quasi*-acquisition. The three cases may be illustrated as follows:—

929. Assume that A. is superior on a completed title *ex facie* absolute embracing the lands, and B. is vassal. A. possesses the lands themselves for the prescriptive period without any challenge or interruption. His title then, by force of the positive prescription, covers the *plenum dominium* as one consolidated estate, and B.'s right is at an end and the superior's right is effectually disburdened of it.[2] It is essential that A.'s infeftment should on the face of it be a title to the lands; it would not be sufficient if it were expressly limited to "the superiority" or "the *dominium directum*," because strictly speaking it is a mistake to say that a party is infeft in the superiority. He is not so, he is infeft in the lands themselves, and that infeftment forms a good title of possession on which he may found prescription.[3] When the infeftment is in the lands, the requirements of the statutes are fulfilled, viz. (*a*) an *ex facie* valid title, and (*b*) possession in terms thereof. But if the infeftment were in "the superiority," then the possession of the *dominium utile* would be, not in terms of the title, but in face of it. In this case of prescriptive consolidation, difficulties might now arise in connection with warrandice. Prior to 1874 that could not be, for it then required forty years' possession to perfect the superior's title by force of the positive prescription, and the same period would extinguish the claim of warrandice by the negative prescription. But, now that the positive prescription is limited to twenty years, the warrandice survives, though of course it gives merely a personal claim, and only against the granter of the obligation of warrandice and his representatives.

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[1] The Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. V. c. 27), s. 11.

[2] *Middleton* v. *Paterson*, 1774, Mor. 10944; *Elibank* v. *Campbell*, 1833, 12 S. 74.

[3] *Walker* v. *Grieve*, 1827, 5 S. 469 (Lord Pres. Hope).

930. Assume that A. holds both superiority (*ex facie* the lands) and property on unlimited titles. The possession of both rights under complete feudal titles to the superiority for forty years will extinguish the fee of property and thereby effect consolidation.[1] It must be carefully noted that this rule does not apply to a proper case of double title to the same lands, in which case the heirs called under the particular separate destination will succeed when a divergence takes place.[2]

931. Assume that A. holds both superiority (*ex facie* the lands) and property, the one on a limited title and the other unlimited. At the outset, it is to be observed that this is not a proper case of double title. That expression means two titles to the same fee; but here there are two fees as well as two titles. Although he will be presumed to possess under the unlimited title as the most favourable to himself, that is only a presumption, and it has been held that where the superiority titles (containing *ex facie* the lands) were limited and those of the property were unlimited, but the circumstances were such as to connect the possession with the limited titles, the right of property was extinguished and brought, by consolidation with the superiority, validly and effectually under the limited title.[3] Again where A. was infeft in fee-simple upon a precept of *clare constat* in the superiority of lands contained in a deed of entail with possession maintained for forty years, but which *quoad* the property had been acquired upon a different title, it was found that by prescription the limitations of the entail were worked off and that a right was established in fee-simple to the property and the superiority.[4] These cases may be contrasted with a later case in which it was held that no consolidation took place.[5]

SECTION 4.—CONSOLIDATION BY MINUTE.

932. The Act of 1874 introduced a new method of consolidation, viz. by separate minute of consolidation recorded in the Register of Sasines.[6]

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[1] *Walker* v. *Grieve*, 1827, 5 S. 469 (Lord Pres. Hope); *Wilson* v. *Pollok*, 1839, 2 D. 159.

[2] Ross's L.C. ii. 577; iii. 531. *Smith* v. *Boyle and Gray*, 1752, Mor. 10803; *Zuille* v. *Morrison*, 4th March 1813, F.C.

[3] *Elibank* v. *Campbell*, 1833, 12 S. 74; *Bontine* v. *Graham and Ors.*, 1837, 15 S. 711.

[4] *Bruce* v. *Carstairs*, 1770, Mor. 10805.

[5] *Earl of Glasgow* v. *Boyle*, 1887, 14 R. 419.

[6] The Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 6.

The titles must first be complete. The minute must describe the lands or refer to them, and the description should be that in the property title—thus maintaining the theory of resignation. In the case of subjects held burgage it is advisable that the minute be recorded in the Burgh Register as well as in the General Register of Sasines.

933. The Conveyancing Act of 1924 extended the methods of consolidation, and in one respect introduced a novel method which does not follow the theory of resignation in that it enables a proprietor to consolidate the two estates before he is infeft in the superiority. It provides that, where a superior infeft has acquired the property or mid-superiority, or the proprietor of the property or mid-superiority infeft has acquired the superiority, a minute written on the disposition and recorded along with it shall be held to consolidate the two rights. It will be noted that the acquisition must be by disposition and that the party in whose favour the disposition has been granted must have been previously infeft in the other fee. Although the act is silent on the point, it is suggested that it is essential that the disposition should be recorded on behalf of the grantee therein. He at his own hand is alone entitled to declare the fees consolidated, but consolidation is not completed until the disposition is recorded, and the declaration of consolidation and the feudalising of the right acquired would appear to be intended to take place at the same time.[1]

SECTION 5.—EFFECTS OF CONSOLIDATION.

SUBSECTION (1)—*Title.*

934. There are certain expressions in the authorities to the effect that consolidation extinguishes the property fee; but these are liable to be misunderstood. Bell writes:[2] "Resignation *ad remanentiam* is to be distinguished from a renunciation. The vassal's estate is not a burden to be thrown off, but an estate of which the conveyance is completed by a ceremony strictly feudal and equivalent to sasine." Lord Westbury pointed out the difference in effect between consolidation and merger under the law of England. He said: "A thing surrendered by English law so as to produce a merger is lost and destroyed. A thing resigned in Scots law *ad per rem.*, if it be a subject in which the *dominium utile* has been granted, is restored to the superior. It is again conjoined to the thing from which it was taken as an integral part thereof, to remain conjoined with it for ever."[3] Although the separate existence of the property fee is brought to an end by consolidation, it appears incorrect to say that the fee is extinguished, or (at least universally) that the original superiority title is, after consolidation, the only title to the united estates. In the case cited the property title embraced salmon fishings, while the superiority title did not; and consolidation having been effected by resignation, it was contended that the superiority title alone remained in force, and that the right to salmon fishings had therefore been lost. This contention was negatived. Lord Colonsay said: "I do not see how consolidation could lose to him the right of fishing which he had acquired." Then what is the title? If the fishings be treated as within the consolidation, this must be a case in which the property title remains in force notwithstanding consolidation. An alternative view is that, *quoad* the fishings, there had been and could be no consolidation, inasmuch as consolidation presupposes and demands the previous existence of the two fees, and here there was only one so far as regards the fishings. These questions come to be of importance when completing the title of an heir or a general disponee, and it would appear clear that the safer practice is to make up the title on the infeftments in the two estates and the procuratory or minute.

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[1] The Conveyancing (Scotland) Act, 1924, (14 & 15 Geo. V. c. 27), s. 11.

[2] Prin., s. 788.

[3] *Earl of Zetland* v. *Glover Incorporation of Perth*, 1870, 8 M. (H.L.), 144.

SUBSECTION (2)—*Destination.*

935. From the fact that after consolidation there is but one united fee, it follows that another effect of consolidation is, that the destination of what was formerly only the superiority rules the descent of the united estates until effectually altered.[1] Such a matter as the salmon fishings in the *Earl of Zetland's* case might be in a special position if the destinations of the two estates were not identical. But regard is had to the character of the estate, and in a question between an heir of line and an heir of conquest as to the succession to teinds (which were conquest of the ancestor) it was held that they fell to the heir of line.[2]

SUBSECTION (3).—*Double Superiority Titles.*

936. If the superiority be held under double titles, the question arises how the above rule as to the effect of consolidation on the destination is to be applied. Suppose the superior is heir of the superiority fee both under a special settlement and under the old investiture, it has been seen that, even though he makes up title under the latter, the former will be the ruling title of the superiority fee. But suppose the superior, after making up his title under the old investiture, acquires the property and consolidates, is the heir under the special destination of the superiority to take the *plenum dominium*? In *Pattison*[3] this result was negatived. It was held that the real rights of the parties were, that the heirs of the investiture were entitled to the property, and the heirs of the special settlement to the superiority. That result was carried out by holding that the legal combined fee descended to the heirs of the investiture, subject to a claim at the instance of the heirs of the special settlement to have a separation of the fees, the superiority estate being again set up as previously existing and then made over to them.

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[1] *Park's Curator* v. *Black*, 1870, 8 M. 671. [2] *Greenock* v. *Greenock*, 1736, Mor. 5612.

[3] *Pattison* v. *Dunn's Trs.*, 1866, 4 M. 1104, affd. 6 M. (H.L.), 147.

SUBSECTION (4).—*Heritage and Conquest.*

937. In a succession opening before the commencement of the 1874 Act, would the heir of conquest be entitled to the consolidated estates if the ancestor had purchased the superiority? It has been decided that when the ancestor purchased the property expressly in order to consolidate it with the superiority, "the property descends to the heir of line who is heir in the superiority." [1] Although there does not appear to have been actual consolidation in that case probably consolidation was assumed, as it was prior to *Bald* v. *Buchanan*.[2] It might be assumed from the decision [1] that if the superiority were purchased by the ancestor the heir of conquest would succeed to the consolidated estates.

SUBSECTION (5).—*Entailed Superiority.*

938. If the superiority fee is held under an entail, and the property held in fee-simple, the question arises whether by consolidation the property is subjected to the fetters of the entail beyond recall. The answer is, that that effect is not produced except by force of prescription. If the consolidation has been by prescription the property is irrevocably dedicated to the entail.[3] If, on the other hand, the consolidation has been by resignation, or by minute, the entail fetters do not affect the property fee until the force of prescription has been superadded. The right of property, having existed as a separate fee, cannot be brought within the operation of the entail statutes (which require registration in a special register to give force to the fetters) by means of a merely feudal ceremony, not combined with the statutory requisites, and performed after the completion of the forms which imposed those fetters on the right of superiority.[4] This distinction between the effect of consolidation by prescription and by statutory method turns on the requirements for the constitution of a strict entail. The *dominium utile* is either fee-simple or it is entailed. If the latter, it can only be because the entail requirements have been fulfilled as regards prohibitory, irritant, and resolutive clauses (or their equivalent), and registration. In that case the property would be held under the entail. But otherwise the necessary result is that the superiority alone is affected by the entail, and the property is held in fee-simple.

When, notwithstanding the consolidation, the property does not fall under the fetters of the entail, the only form in which the heirs of entail can vindicate it as fee-simple is by reconstituting the feu.

SUBSECTION (6).—*The Over-Superior's Position.*

939. Sec. 7 of the 1874 Act provides that "no consolidation that may be effected . . . shall in any way affect or extend the rights or

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[1] *Earl of Selkirk* v. *Duke of Hamilton*, 8th January 1740; Elchies, *sub voce* "Heritage and Conquest," No. 3.

[2] 1786, Mor. 15084; affd. 1787, Mor. 15089.

[3] *Elibank* v. *Campbell*, 1833, 12 S. 74; *Bontine* v. *Graham*, 1837, 15 S. 711.

[4] Duff, Feud. Convey., p. 493; *Heron* v. *Duke of Queensberry*, 1733, 1 Paton's App. 98.

CONSTITUTIONAL LAW.

TABLE OF CONTENTS.

	PAGE
Definition	416
Sources	416
United Kingdom	417
Legislation	418
General	418
Money Bills	418
"Other Bills"	419
Sovereignty of Parliament	420
British Parliament and Colonial Legislatures	421
The Colonial Laws Validity Act, 1865	421
The "Dominions"	421
India	422
The Judiciary	423
Relation of Crown to Judiciary	423
Colonial Courts	424
Appeals to King in Council	425

SECTION 1.—DEFINITION.

942. The sphere of Constitutional Law is generally regarded as covering two distinct branches of law. In the first place, it includes all rules which determine the composition and the mutual relations of the different parts of the machinery of government; in the second place it embraces the rules of law which concern the relations of the State and the subject *inter se*. It is with the former of these that the present article is concerned; the latter topic is treated under the title CROWN. As the sovereign power in the State performs three distinct functions, there are three separate parts in the Constitution, which (in different degrees) require attention. These are the Legislature, or law-enacting branch; the Executive, which (1) speaks and acts on behalf of the State as its voice and hand in all its relations with other States, and (2) controls the administration and execution within the State of the laws made by the legislature; and the Judiciary, which interprets the law and applies it to the facts of particular disputes brought before it for adjudication. The main part of constitutional law, therefore, consists of the rules which concern the structure, and the mutual relations, of these three parts of the "Constitution."

SECTION 2.—SOURCES.

943. In contradistinction to the almost universal practice of modern States, by which the rules regulating the framework of government are expressed and enacted in one "fundamental law," the British Constitution is not to be found in any one particular document. Its rules are to be found partly in statute law, partly in documents commonly called quasi-statutes, such as the Magna Carta,[1] and partly in the common law.[1] These sources provide the rules which are strictly the *law* of the Constitution; but much of its practice depends upon *conventions* or usages, which would not be recognised in the courts although they play a large part in the actual working of the Constitution. This latter feature is particularly noticeable in connection with the executive department of government. A large body of conventions has grown up for the regulation of the relations of the King and his Ministers. The dissolution of a Cabinet, and the formation of a new one, and the precise functions of the Prime Minister, the other Ministers, and the Sovereign are determined by tradition and usage. Like other rules derived from the same source, these constitutional conventions are in a state of gradual—often imperceptible—transition and development. A constant process of adaptation to new conditions makes it often difficult to state such conventional rules with precision and accuracy; at no time do they become stereotyped like enacted law.

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[1] It is a common error to include in this class the Bill of Rights; for this became an Act of Parliament as 1 Will. & Mary, sess. 2, c. 2.

SECTION 3.—UNITED KINGDOM.

944. It is primarily with the constitution of the United Kingdom that we are concerned. It may, however, be said that the constitutional law of the United Kingdom represents in unbroken historical continuity the constitutional law of England; for upon the union of Scotland and England in 1707,[2] the political institutions of the United Kingdom of Great Britain carried on with little or no change the practices and traditions of those of the larger kingdom.[3] The same is substantially true of the later union with Ireland. In the former case the very names of the former Kingdoms of Scotland and England disappeared, as they were merged under the new title of Great Britain. At the second union the names of the uniting parts were preserved in the new name of the whole—the United Kingdom of Great Britain and Ireland.[4] Notwithstanding the excision from the United Kingdom of the greater part of Ireland under the name of the Irish Free State by the Irish Free State Constitution Act, 1922,[5] the territories with whose constitution we are now concerned officially bore the same designation, until provision was made in the Royal and Parliamentary Titles Act, 1927,[6] that the change in the actual conditions should be officially recognised by a modification in the official title of the King and of Parliament. By the terms of that statute the Parliament becomes officially the "Parliament of the United Kingdom of Great Britain and Northern Ireland."

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[1] It is usual but erroneous to add the Treaties of 1707 and 1801 which formed the United Kingdom. Their constitutional provisions were incorporated in, and acquired their authority from, the Acts of Union.

[2] Scots Act, 1707, c. 7; English Act, 5 Anne, c. 8. Each recites the Articles of the Treaty of Union.

[3] Separate Privy Councils were not abolished by the Union, but one of the first acts of the united parliament was to provide, by 6 Anne, c. 6: "An Act for rendering the Union of the Two Kingdoms more intire and compleat," that there should be only one Privy Council, and that its powers should be such as the English Privy Council had at the Union.

[4] 39 & 40 Geo. III. c. 67.

[5] 13 Geo. V. sess. 2, c. 1.

[6] 17 Geo. V. c. 4, and Royal Proclamation thereunder in Edinburgh Gazette, 13th May 1927. See Summary of Proceedings of Imperial Conference, 1926 (Cmd. 2769), p. 16; also the former official title as prescribed by Royal Proclamation under the Royal Titles Act, 1901 (1 Edw. VII. c. 15).

SECTION 4.—LEGISLATION.

SUBSECTION (1).—*General.*

945. The supreme Legislature is "the King in Parliament." From a very early period of English history the enacting of laws required the concurrence of the three parties who composed the Legislature, viz. the Crown, the House of Lords, and the House of Commons; and until early in the eighteenth century this principle did actually mean the unanimity of three distinct wills. But in the last two centuries the mutual relations of these three have been fundamentally altered, and the concurrence of the three wills has become a fiction. The separate personal assent of the Sovereign to legislation ceased to be an actual part of legislation when personal rule gave place to the doctrine of ministerial responsibility for all royal acts. The last instance of a refusal of the monarch to assent to a Bill which had been passed by both Houses of Parliament occurred in the reign of Queen Anne.[1] In more recent times the "royal assent" has been an act of State performed by the Sovereign on the advice of his Ministers; and the absence of any controversy on the granting of this assent has been due to the peculiarly close relations existing between the King's Ministers and the Legislature. Not only the presence of all Ministers in one or other House of Parliament, but still more the harmony of policy between the ministry and the Commons,[2] which modern constitutional practice requires, makes it impossible for the question of refusing the assent to arise. Since any vote of the House of Commons adverse to the policy of the ministry involves the fall of the latter, it follows that no ministry is ever faced with the problem of dealing with a Bill, of which it disapproves, being presented by Parliament for the Royal assent.

SUBSECTION (2).—*Money Bills.*

946. The theoretical equality of the two Houses suffered one exception at an early time. Since 1407 [3] (9 Henry IV.) the practice has been uniform that all "money Bills" originate in the House of Commons; and the class of legislation thus popularly designated has come to include the two branches of financial legislation in its modern form—that is, Bills granting and appropriating "supply" for the public service, and also Bills imposing taxation. A further limitation upon the powers of the House of Lords with reference to "money Bills" became firmly established in the seventeenth century, to the effect that it was not within their functions to amend such a Bill or to alter in any way the form in which it had reached them from the House of Commons. This rule may be said to have been established since 1671.[1] From that time the Lords acquiesced in this limitation upon their powers; but they maintained from time to time their right to refuse their assent to financial measures passed by the House of Commons.[2]

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[1] Anson, Law and Custom of the Constitution, 5th ed., i. 337.
[2] See CABINET, *ante*, vol. ii. p 536.
[3] Anson, Law and Custom .of the Constitution, 5th ed., i. 281.

947. All these conventional regulations of the relations of the Houses were superseded by the enactment in 1911 of the Parliament Act.[3] By that important measure the relations of the Houses were taken out of the sphere of constitutional conventions and made the subject of statutory regulation. By its provisions, parliamentary public Bills were divided into two classes for the purpose of regulating the powers of the House of Lords with reference to them. "Money Bills" (as defined by s. 1 (2)) were treated in a class by themselves; and all other public Bills were grouped into another class. With reference to "money Bills," it was enacted that if such a measure, passed by the Commons and "sent up" to the Lords at least one month before the end of the session is not passed by them "without amendment" within one month after being sent up, it shall (unless the House of Commons direct to the contrary) "be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified."

SUBSECTION (3).—"*Other Bills.*"

948. The relations of the Houses to one another and their relative powers over general legislation were fundamentally altered by the same statute. Sec. 2 (1) of the Parliament Act enacts that if a public Bill (other than a money Bill or a Bill to extend the duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same parliament or not) and, having been sent up to the Lords at least one month before the end of the session, is rejected[4] on each occasion, it is to become an Act of Parliament upon receiving the Royal Assent, provided that two years have elapsed between the second reading in the House of Commons in the first session and the date on which the Bill passes the House of Commons in the third session.

949. It thus results from the terms of the Parliament Act that there are two types of statute: the familiar form of an Act passed with the consent of the House of Lords, and bearing the long familiar enacting clause: "by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same"; and the other class passed without consent of the Lords, and bearing the new enacting formula: "by and with the advice and consent of the Commons . . . in accordance with the provisions of the Parliament Act, 1911, and by authority of the same." [1] The legal force and effect of the one type is precisely the same as that of the other.

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[1] Anson, *op. cit.* p. 282. [2] Notably in 1860 and 1909. [3] 1 & 2 Geo. V. c. 13.

[4] For the equivalence of delaying and rejecting, see the terms of the section.

Section 5.—Sovereignty of Parliament.

950. The Parliament of the United Kingdom has unlimited law-making power within the territories and over all persons in the King's allegiance. Every statute is binding to the fullest extent on the executive and on the judiciary no less than on the individual citizen. Neither constitutional rules nor elementary private rights are protected against the will of the "Sovereign" Legislature.

951. The geographical extent of this law-making power covers all the territories which are included in the King's dominions. Upon the addition of new lands to these dominions, by cession, conquest,[2] annexation or otherwise, the Crown has extensive rights both of administration and legislation. It has even the strict legal right to cede territory to another sovereign power although such a cession would now in practice be ratified by legislation.[3] New territory acquired by the Crown becomes, technically, a "colony." [4] So long as representative government is not conferred on a colony, the Crown's right of legislation remains unimpaired except in so far as legislation of the United Kingdom Parliament is applied to that colony. The Crown's legislative power is normally exercised by the Governor or other local representative of the Crown, with or without the advice of a local nominated Council. There is, however, a concurrent method of legislating by Order in Council.

952. When a local legislature [5] is established in a colony, this delegation of legislative power is either by Royal act in the form of Letters Patent,[6] or by Act of Parliament.[7] If the composition of the Legislature provides for the election of at least one-half of its members by the inhabitants of the colony, it is technically known as a "representative legislature." [8] The effect of such delegation is to deprive the Crown of its legislative powers in that colony except in so far as expressly reserved in the grant.[9] If there is not conferred on the colony the further and distinct privilege of "responsible government," the functions of administration are still carried on by the King's local representative with responsibility merely to the home government and not to the local legislature. But after concession of responsible government to a colony, the Governor acts through, and on the advice of, colonial ministers who are responsible to the colonial legislature and dependent for their continuance in office on its approval, in the same way as a British Cabinet is dependent upon Parliament.

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[1] Section 4 (1).

[2] For the rights of the Crown after conquest, see *Campbell* v. *Hall*, 1774, 20 St. Tr. 239.

[3] The cession of Heligoland to Germany in 1890 was made expressly subject to ratification by Parliament, and was in due course confirmed by 53 & 54 Vict. c. 32.

[4] All British territory outside the United Kingdom is included in the term "British Possessions"; when British India, the Channel Islands, and the Isle of Man are excluded, the remainder is termed "colonies." See Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (2), (3).

[5] See Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 1.

[6] *E.g.* Natal, 1847, Cape of Good Hope, 1858.

[7] *E.g.* Australian Constitutions Act, 1850 (13 & 14 Vict. c. 59), giving powers subsequently exercised by the different colonies.

[8] Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 1.

[9] *Campbell* v. *Hall, cit. sup.*

SECTION 6.—BRITISH PARLIAMENT AND COLONIAL LEGISLATURES.

SUBSECTION (1).—*The Colonial Laws Validity Act*, 1865.

953. In the early days of colonial development doubts were raised in the English Courts as to (1) whether a colonial legislature could make laws inconsistent with the common law of England, and (2) what was the relation of the colonial and the United Kingdom legislation when these were not consistent. These doubts led to the enactment of the Colonial Laws Validity Act, 1865.[1] It was there provided that no colonial law should be void or inoperative "on the ground of repugnancy to the law of England";[2] and, further, that a colonial law which is in any respect repugnant to any Act of Parliament "extending to" that colony shall be read subject to the Act of Parliament, and "to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."[3] In this way the ultimate sovereignty of the United Kingdom Parliament over the whole colonial dominions of the Crown has been reaffirmed and declared by statute.

SUBSECTION (2).—*The "Dominions."*

954. According to the statements of the last paragraph, the supremacy of Parliament in legislation suffers no exception in any part of the British Dominions; and this in strict legal theory is true, notwithstanding the fullest rights of self-government in legislation and administration which have been conferred on all "colonies" inhabited by persons of European race. There are now five important parts of the British Empire which enjoy this highest measure of autonomy, which has come to be known as "dominion status." In each of these there is in force a constitutional system providing for a legislature, an executive, and a judiciary, modelled (more or less closely) on that of the United Kingdom, and deriving its ultimate legal force from a statute of the United Kingdom Parliament.[4] The constitutional provisions thus enacted are, subject to some limitations,[5] generally declared to be susceptible of amendment by the dominion legislatures in the manner prescribed by the respective constitution Acts; but these Acts, nevertheless, remain like all other statutes, subject also to the power of the Parliament of the United Kingdom to alter or repeal. The powers conferred are in strict legal theory delegated powers which may be modified or withdrawn.

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[1] 28 & 29 Vict. c. 63.

[2] Sec. 3.

[3] Sec. 2.

[4] The Dominion constitutions will be found in the following statutes: New Zealand, the New Zealand Constitution Act, 1852 (15 & 16 Vict. c. 72); Canada, the British North America Act, 1867 (30 Vict. c. 3); Commonwealth of Australia, the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12); Union of South Africa, the South Africa Act, 1909 (9 Edw. VII. c. 9); Irish Free State, the Irish Free State Constitution Act, 1922 (13 Geo. V. (sess. 2) c. 1).

[5] *E.g.* South Africa Act, 1909, s. 152.

955. The necessity for adapting the law to modern conditions has not been overlooked in recent times. At the Imperial Conference, 1926, the principal of strict legal equality among "the group of self-governing communities composed of Great Britain and the Dominions" was unanimously accepted; and the proposition was further adopted that "they are autonomous communities . . . equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations."[1] To give legal effect to this new constitutional position, statutory changes are clearly required to amend the law relating to (1) "reservation" of statutes of Dominion legislatures for the approval or otherwise of the Crown (which means the United Kingdom Ministers), (2) the right of the Crown (in the same sense) to "disallow" Dominion statutes, and (3) the present power of the United Kingdom Parliament to legislate for the Dominions as declared by the Colonial Laws Validity Act, 1865.

SUBSECTION (3).—*India.*

956. Distinguished on the one hand from the self-governing Dominions, and now also from the Crown Colonies, the position of British India was for long similar to that of the latter class. A conquest, not of the Crown directly, but of British subjects associated under the name of the East India Company, it became constitutionally vested in the Crown; and this fact was recognised in the institution in 1784 of a "President of the Board of Control," who was a Minister of the Crown and had the ultimate determination of policy.[2] After the Mutiny, the Company was excluded from all share in the administration, and all its powers were vested in a Secretary of State, advised by a Council of India.[3] Under this system India was governed until the movement in favour of conferring greater influence and power on the inhabitants led to the granting of a constitution with limited powers of self-government.[4] A central Indian legislature with two Chambers was set up, and in each separate province a legislature was formed with power to make laws "for the peace and good government" of its province. Many provisions of the Act, however, restrict the powers conferred in these general terms, and distinguish this Indian constitution from the very comprehensive autonomy enjoyed by the "Dominions."

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[1] Summary of Proceedings of Imperial Conference, 1926 (Cmd. 2769), p. 14.

[2] 24 Geo. III. (sess. 2) c. 25 ("Pitt's India Act").

[3] Government of India Act, 1858 (21 & 22 Vict. c. 106).

[4] Government of India Act, 1919 (9 & 10 Geo. V. c. 101). This constitution is an amendment of a tentative effort at conferring a limited self-government in the Government of India Act, 1915 (5 & 6 Geo. V. c. 61).

SECTION 7.—THE JUDICIARY.

SUBSECTION (1).—*Relation of Crown to Judiciary.*

957. The King is "the fount of justice." The institution of Courts of law and the appointment of judges are "an inherent prerogative of the Crown." [1] Like other prerogative rights this has been the subject of a long course of attenuation and restriction through the action of the Legislature; with the result that in the United Kingdom statute law now regulates the constitution and functions, the powers and the procedure, of all courts, even to the minutest details. It is true that the nomination of the persons to be judges is still left to the Crown, acting, of course, on the advice of responsible Ministers; but the choice in the case of the superior courts is restricted by statutory rules as to the qualifications which the nominees of the Crown require to possess.

958. The prerogative right, prior to its restriction by statute, involved a power in the Crown to dismiss judges, or (in other words) to revoke their commissions; and this power led to a prolonged constitutional struggle between the Crown and the Parliament both in Scotland and in England. In the latter country in particular it became a practice of the later Stuart kings to employ their power of dismissal in order to secure a favourable decision in cases affecting the royal prerogative.[2] As a result of this popular grievance against the Stuart kings, measures were taken in both countries at, or soon after, the expulsion of James VII. and II. to obtain security of tenure for judges. In Scotland the Estates on 11th April 1689 included in the Claim of Right which formed the basis of their offer of the Scottish Crown to William and Mary the following declaration: "That the sending letters to the courts of Justice, Ordaining the judges to stop or desist from determining Causes, or ordaining them how to proceed in Causes depending before them, and the changeing the nature of the Judges gifts *ad vitam aut culpam* Into Commissions *durante beneplacito* is contrary to law." The Convention Parliament in England made no similar declaration in the Bill of Rights; but the omission was repaired in 1700 in the Act of Settlement,[3] which enacted "that after the said limitation shall take effect as aforesaid,[4] Judges commissions be made *Quamdiu se bene gesserint* and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." [5]

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[1] Preamble to Statute 10, Geo. I. c. 19.

[2] See Political History of England, vii. 75, 76 (James I. and Chief-Justice Coke); viii. 264 (James II. and case of *Godden* v. *Hales*).

[3] 12 & 13 Wm. III. c. 2.

[4] *I.e.* after the anticipated succession of the House of Hanover as therein provided.

[5] Re-enacted in substance by the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. V. c. 49), s. 12.

959. After the Union of the Kingdoms in 1707 the course of legislation tended more effectually to establish the independence of the Judiciary. Until the accession of George III. the close connection of the judges with the Crown was emphasised by the fact that their commissions lapsed with the death of the particular king who had granted them;[1] but at his accession and upon his representations an Act[2] was passed which provided (1) that commissions of judges should remain in force notwithstanding the demise of the Crown (s. 1); (2) that it should be lawful for His Majesty to remove any judge "upon the address of both Houses of Parliament"[3] (s. 2); and (3) that judges' salaries should be charged upon the Civil List (s. 4). Subsequently, by a series of statutes, the judges' salaries were charged directly on the Consolidated Fund.[4]

SUBSECTION (2).—*Colonial Courts.*

960. The prerogative right of establishing courts of law survives unimpaired in parts of His Majesty's dominions in which there is no legislature other than the Crown. But this Crown prerogative is at once curtailed by the institution of a local legislature, so that no jurisdiction after that event can be conferred by the sole authority of the Crown. "After a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom."[5] On the other hand, the inherent right of every colonial legislature (without regard to the particular terms of its constitution) to make provision for the administration of justice through courts of law established by it was recognised by s. 5 of the Colonial Laws Validity Act, 1865,[6] which enacted that "every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature. . . ."

961. In the case of Crown Colonies in which there is no local legislature, the judges' commissions are still in theory revocable at pleasure by the Crown;[7] while in other colonies the tenure depends upon local legislation. In the constitutions conferred on the self-governing Dominions the conditions of judicial tenure established by statute for the United Kingdom have been reproduced in the form of express constitutional provisions. In the earliest in date, removal may be only on an address from both Houses of the Dominion Parliament;[8]

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[1] Although re-appointment seems to have been almost invariable.

[2] 1760, 1 Geo. III. c. 23.

[3] It is at least doubtful whether any such provision for the removal of judges applies to Scotland.

[4] *Cf.* Todd, Parliamentary Government, 2nd ed., ii. 855 *et seq.*

[5] *In re Bishop of Natal,* 1864, 3 Moo., P.C.C. (N.S.) 115, *per curiam* at p. 148.

[6] 28 & 29 Vict. c. 63.

[7] Todd, Parliamentary Government, 2nd ed., ii. 880.

[8] British North America Act, 1867 (30 Vict. c. 3), s. 99.

in the later, a similar address is essential, but it must pray the Governor for removal "on the ground of [proved] misbehaviour or incapacity." [1]

SUBSECTION (3).—*Appeals to King in Council.*

962. It is a relic of the Crown's prerogative right of justice that appeals may still be taken from courts outside the United Kingdom to the King in Council. The appellate jurisdiction of the Kings of England, exercised in and through the Privy Council, and for a time by the Court of Star Chamber, was abolished by the Long Parliament in so far as it affected causes arising in England. But it survived and continued in full force for appeals from the King's overseas Dominions. Thus, appeals from the Channel Islands are recorded in the reign of Henry VIII.; and with the extension of English colonies and plantations in America in the 17th century provision was made for hearing appeals from their courts. A royal grant of jurisdiction would not readily be construed so as to exclude a litigant's right to appeal for justice to the Sovereign.[2] To administer this part of the royal jurisdiction, and to define its scope, a statute of 1833 [3] was passed which set up the "Judicial Committee" of the Privy Council which still hears and decides appeals from India and the Colonies. The elaborate constitutions conferred on the Dominions have in some cases taken away the hitherto unqualified right of the litigant to appeal, and have substituted for it a right "to petition His Majesty for special leave to appeal," [4] and in other cases have come very near to depriving him of the right altogether.[5]

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[1] Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 72; South Africa Act, 1909 (9 Edw. VII. c. 9), s. 101. The word "proved" occurs only in the Australian Act.

[2] *Christian* v. *Corren,* 1716, 1 P. Williams 329.

[3] Judicial Committee Act, 1833 (3 & 4 Wm. IV. c. 41).

[4] South Africa Act, 1909 (9 Edw. VII. c. 9) s. 106; Irish Free State Constitution Act, 1922 (13 Geo. V. (sess. 2) c. 1), Sched. Art. 66.

[5] See generally Bentwith, Privy Council Practice, 2nd ed., 1926.

CONSTRUCTION OF STATUTES.

See STATUTE LAW.

CONSTRUCTIVE TRUST.

See TRUST.

CONSUETUDINARY LAW.

See LAW.

CONSUETUDO DEBET ESSE CERTA.

See CUSTOM AND USAGE; MAXIMS.

CONSUETUDO EST OPTIMA LEGUM INTERPRES.

CONSUETUDO LOCI EST OBSERVANDA.

See MAXIMS.

CONSUL.

See INTERNATIONAL LAW.

CONSULTATION OF JUDGES.

See COURT OF SESSION.

CONSUMPTION, BONA FIDE.

See BONA ET MALA FIDES.

CONTAGIOUS DISEASES (ANIMAL).

See ANIMALS.

CONTEMPORANEA EXPOSITIO.

See MAXIMS; STATUTE LAW.

CONTEMPT OF COURT.

TABLE OF CONTENTS.

	PAGE
Definition	428
Insolent or Unseemly Behaviour in Court	428
Improper Attempts to Influence the Course of Justice	430
Defiance or Wilful Non-observance of Decrees of the Court	432
Jurisdiction	433
Procedure	433
Punishment	434
Review	434
Breach of Interdict	435
General	435
Petition and Complaint	435
Procedure in Petition and Complaint	436
Punishment	438
Review	438

SECTION 1.—DEFINITION.

963. Contempt of Court may be defined as any conduct that tends to bring the authority and administration of the law into disrespect or disregard or to interfere with the due administration of justice. It may be conveniently classified under three heads, viz. (1) insolent conduct towards the Court or to the Judge or Magistrate while in the discharge of his judicial functions, or unseemly behaviour in Court or within the precincts thereof; (2) attempts by improper means (other than those referred to under head (1)) to influence the course of justice or to bring the administration of the law into contempt; and (3) defiance or wilful non-observance of decrees of the Court.

SECTION 2.—INSOLENT OR UNSEEMLY BEHAVIOUR IN COURT.

964. "All such disorders or misdemeanours in Court during the progress of a trial as are a disturbance of the Judge in the exercise of his functions or a violation of that deference which ought to be observed towards him when proceeding in his office; the hindrance, therefore, or molestation of the officers of Court in their duty, the use of any threatening language or contumelious speech or gesture there with relation to the Judge or the trial, any open expression of censure or approbation of the proceedings of the Judge or the Jury as by acclamation or otherwise; nay, the wilful and repeated breaking of silence in Court, all these are examples of this sort of petulant contempt for which the Magistrate may reprove the delinquent of his own knowledge and upon the spot. All wilful disobedience or gross neglect of the orders or precepts of Court in matters relative to any trial is in like manner necessary to be subdued without delay."[1] Baron Hume is here speaking of Criminal

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[1] Hume, ii. 138.

Courts, but the same rules hold in Civil Courts, and it is by virtue of this inherent right to punish for contempt that rules for the regulation of order in Court are made and enforced. Everyone, whether litigant, witness, legal practitioner, or other person, is bound to obey such rules.

965. The following are examples of contempt of Court falling within this category:—Contemptuous behaviour by a prisoner when receiving sentence;[1] a panel or a witness or a juryman appearing in Court in a state of intoxication;[2] a witness remaining mute and refusing to answer competent questions;[3] a witness who was not a Quaker refusing to be sworn;[4] a witness escaping from the precincts of the Court by violently forcing a padlock of a door (having been duly enclosed until called on to give evidence);[5] granting to a panel for use in mitigation of sentence a certificate of good character which, if not false, was at least a suppression of the truth.[6] It has been held that merely to address unbecoming words to a magistrate is not necessarily contempt of court.[7] Prevarication by a witness may be punished as a contempt; and it is not necessary that the Judge who holds that the witness has prevaricated should state the circumstances—it is enough that he hold that there was prevarication.[8] It is, however, exceedingly rare to punish witnesses summarily for prevarication.[9]

966. The following have been held to be contempts by legal practitioners:—A statement in a Reclaiming Petition prepared by an agent that the Sheriff-Substitute nearly always decided his (the agent's) cases against his clients, and that he doubted his impartiality;[10] refusing to expunge from a record a statement which the Sheriff-Substitute considered insulting;[11] removing a process against the orders of the Sheriff-Substitute before whom the case was depending.[12]

967. As regards members of the public present in Court during a trial or other judicial proceeding there can be no doubt that everyone who behaves in a disorderly manner or refuses to obey the orders of the Court is guilty of contempt. In such cases the practice is to cause the offending party to be summarily ejected, or, if the disturbance is general, to clear the Court.

968. The Lords of Justiciary have a special jurisdiction over persons in stations of public trust in matters pertaining to criminal police. "In the exercise of this control they may summarily inflict a suitable censure on messengers or macers for negligence, extortion, or any other abuse in the citation of panels, witnesses, or assizers towards trial in the Court of

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[1] *Clark*, 1829, Shaw 215.

[2] *M'Lean*, 1838, 2 Swin. 185; *Allan*, 1826, Shaw 172; *Wilson* (O.H.), 1921, 2 S.L.T. 139.

[3] *Kerr*, 1822, Shaw 68.

[4] *Tweedie*, 1829, Shaw 222.

[5] *Innes*, 1831, Shaw 238.

[6] *Nimmo*, 1839, 2 Swin. 338.

[7] *Lawrie* v. *Roberts*, 1882, 9 R. (J.) 22, 4 Coup. 606; see also *King* v. *Davidson*, 1821, 4 Barn. & Ald. 329.

[8] *M'Ewen*, 1829, Shaw 213; *Macleod* v. *Speirs*, 1884, 11 R. (J.) 26; 5 Coup. 387.

[9] *Macleod, supra*, per Lord Young at p. 34.

[10] *Broatch, Petr.*, 1878, 5 R. 702.

[11] *Hamilton* v. *Anderson*, 1858, 3 Macq. 363.

[12] *Watt* v. *Thomson*, 1870, 8 M. (H.L.) 77; *Watt* v. *Ligertwood*, 1874, 1 R. (H.L.) 21.

Justiciary, or in taking or conveying of prisoners on their warrants; on jailers also for cruelty or oppression towards prisoners for crimes; . . . on Sheriffs for failure to attend the Judges on their Circuits, or inaccuracy in the execution of the Porteous Rolls, or of the warrants of the Lords of Justiciary for the conveyance of criminals and the like; on Clerks of the Court of Justiciary for exacting improper fees or other gross omissions, blunders, or falsehoods in the acts of their official duty." [1] Many of the acts here mentioned would probably now be punished otherwise; but Sheriffs, for instance, who are bound to attend on the Judges on Circuit under the Act 1847, c. 103, would be guilty of contempt if they failed to do so without lawful excuse. In England High Sheriffs who fail to attend in a proper manner on the Judges on Circuit are heavily fined for contempt; and in Ireland police who refused to give assistance to a Sheriff in carrying out an order of Court were held guilty of contempt.[2]

SECTION 3.—IMPROPER ATTEMPTS TO INFLUENCE THE COURSE OF JUSTICE.

969. Under this head are included attempts by improper means to influence Judges in their judicial conduct, slander upon the proceedings of the Court in a particular case, and publications which tend to prejudice the fair trial of a cause. Where during the dependence of a cause the pursuer wrote to several Judges, Members of Parliament, and others letters relative to the process, some of which were printed, the Court after proof on a Petition and Complaint held him guilty of having defamed, calumniated, and libelled several of the Judges and the administration of justice, and his conduct was therefore found to be a high contempt.[3] A Writer to the Signet, who had written and transmitted to the Lord President of the Court of Session a letter reflecting upon his judicial conduct and containing matter disrespectful and insolent to the Court and injurious to the administration of justice, was held guilty of "a high offence against the dignity of this Court tending to prejudice the due administration of justice therein." [4] Slanders upon the proceedings of the Court and calumnious attacks upon Judges in their official capacity are contempts, even though made shortly after the trial is over.[5] On the other hand, it is not a contempt of Court to slander or libel a Judge provided the slander or libel has no reference to any particular case.[6] Intimidation of witnesses is contempt of Court as being an attempt to interfere with the due administration of justice.[7]

970. The rule in England is the same. Thus, in *Charlton's* case,[8] Charlton had written letters to a Master in Chancery and also to the Lord

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[1] Hume, ii. 141.

[2] *Attorney-General* v. *Kissane*, 1892, 32 L.R. Ir. 220; *Miller*, 1838, 4 Bing. (N.C.) 574.

[3] *Lord Advocate* v. *Hay*, 1822, 1 S. 288. See also *Lord Advocate* v. *Prentice*, 1822, 1 S. 385.

[4] *Lord Advocate* v. *Jamieson*, 1822, 1 S. 285.

[5] Hume, ii. 139; *M'Leod*, 1820, Shaw 3.

[6] *Bahama Islands* [1893], A.C. 138.

[7] *Forkes* v. *Weir*, 1897, 5 S.L.T. 194.

[8] 1836–7, 2 My. & C. 316.

Chancellor reflecting on their conduct. The Lord Chancellor remarked that, if the object was to taint the source of justice and to obtain a result of legal proceedings different from what would follow in the ordinary course, it is a contempt of the highest order. When a True Bill had been found against the defendant (Tichborne), it was held to be a contempt to address public meetings stating that he was not guilty.[1]

971. In modern times, however, the most frequent contempts falling under this category consist in the publication of articles in the Press or elsewhere which affect the parties to a cause and so tend to prejudice its fair trial. This may be done by a litigant.[2] And even though the publication be not treated as an act of contempt, it will be stopped if it tend to prejudice the fair trial of the cause.[3] On the other hand, the publication may be by a third party such as the editor of or a contributor to a newspaper.[4] The general rule regarding publication is that individuals or the Press are entitled to discuss all matters of public interest, even though they should in so doing attack individuals, subject only to the risk of being sued for damages for libel. But if as a result of such articles or otherwise an individual is apprehended on a criminal charge or institutes civil proceedings, the publication of further articles regarding him may be stopped, if the Court considers that their publication would tend to prejudice the fair trial of the cause;[5] and it would be an act of contempt to refuse to obey such an order. This jurisdiction, however, can only be exercised by the Court of Session or the High Court of Justiciary. Accordingly, if parties who are to be tried or who are litigating in the Sheriff Court or one of the inferior Courts desire to have the publication of such articles stopped, the proper method is to present a Petition for Interdict. It has been decided in an English case[6] that publication in a newspaper of the photograph of a person charged with a criminal offence is a contempt of Court provided it is reasonably clear that the question of identity of the accused with the criminal has arisen or may arise for determination. The question as to whether such publication would be a contempt, if made when proceedings were imminent but had not actually commenced, was not decided.

972. At the same time it is clear that it is not a contempt of Court to publish what occurs in open Court, though in certain circumstances the publication of reports of judicial proceedings may be a statutory offence.[7] "The publication by newspapers of what takes place in Court at the hearing of any cause is undoubtedly lawful; and if it be reported in a fair and faithful manner the publisher is not responsible though the report contains statements or details of evidence affecting the character of either of the parties or of other persons; and whatever takes place in open Court falls under the same rule, though it may be either before or after the proper hearing of the cause. The principle upon which this rule is founded seems to be that as Courts of Justice are open to the public anything that takes place before a judge is thereby necessarily and legitimately made public; and being once legitimately made public property may be republished without inferring any responsibility." [1] In the case cited it was decided that the right to publish only applied to public documents, and that a Summons called in Court but upon which no other step of procedure had followed was not a public document.[2] The publication in a newspaper of an Open Record or of extracts therefrom is a contempt of Court and is regarded as a serious offence.[3]

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[1] *Skipworth's* case, 1873, L.R., 9 Q.B. 230.

[2] *Henderson* v. *Laing*, 1824, 3 S. 384.

[3] *Miller* v. *Mitchell*, 1835, 13 S. 644; *Smith* v. *Mitchell*, 1835, 14 S. 172.

[4] *Watson* v. *Murray*, 1820, Shaw 9; *M'Lauchlan* v. *Carson*, 1826, 5 S. 147.

[5] *Smith* v. *Ritchie & Co.*, 1892, 20 R. (J.) 52; 3 Wh. 408; *Edmond*, 1829, Shaw 299.

[6] *Rex* v. "*Daily Mirror*," [1927] 1 K.B. 845.

[7] Judicial Proceedings (Regulation of Reports) Act, 1926 (16 & 17 Geo. V. c. 61).

973. The Court itself is the judge as to whether an act of contempt has been committed or not; and it may hold that there has been no contempt though statements have been published which are manifestly intended to influence the public.[4] A newspaper having published a Closed Record containing the pursuer's amendments put on at adjustment, the defenders wrote a letter to the editor of the newspaper stating that the pursuer's averments were a tissue of libellous falsehoods; this letter was published in the newspaper. It was held that in the circumstances the publication was not a contempt of Court. The ground of judgment was that the irregularity arose through the fault of the pursuer's agent who, after the Record had been formally closed, handed to the newspaper reporters a print of what bore to be the Closed Record in the action, but which in fact did not incorporate the defender's answers to the pursuer's adjustments.[5]

SECTION 4.—DEFIANCE OR WILFUL NON-OBSERVANCE OF DECREES OF THE COURT.

974. Power to enforce their decrees is a necessary part of the jurisdiction of all Courts, whether Civil or Criminal. In criminal cases no difficulty occurs. In civil actions the decrees of Court are enforced by ordinary diligence, or in the case of decrees *ad factum præstandum* by imprisonment. In the case of some decrees *ad factum præstandum* a mode of enforcement other than imprisonment is sometimes more effective. Thus where a decree had been pronounced ordaining a lady to deliver up a policy of insurance, the Court granted warrant to messengers-at-arms to search for, recover, and take possession of the policy, and if necessary to open all shut and lockfast places.[6] But there are other orders of the Court either to do or not to do something, disobedience to which is treated as a contempt of Court. Of these the best illustration is the case of Breach of Interdict,[1] interdict being an order not to do something which but for the order might be done with impunity.

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[1] Per Lord President Inglis in *Richardson* v. *Wilson*, 1879, 7 R. 237.

[2] See also *Gilfillan* v. *Ure*, 1824, 3 S. 21.

[3] *Young* v. *Armour* (O.H.), 1921, 1 S.L.T. 211.

[4] *M'Leod* v. *Justices of Peace of Lewis*, 1892, 20 R. 218.

[5] See also *St. Mungo Manufacturing Company* v. *Hutchison, Main & Co.*, 1908, 15 S.L.T. 893, where, while interdict proceedings were pending over the infringement of a patent, a circular was issued to the respondents' customers.

[6] *Ferguson's Curator Bonis*, 1905, 7 F. 898.

975. There are besides numerous positive orders the non-observance of which is punished as contempt. Thus where the mother and stepfather of a child were ordered to deliver up the child, and failed to do so, warrant was granted to take the child from the mother. The officers being unable to find the child, the Court ordered the mother and the stepfather to appear at the bar. The stepfather alone appeared, and having declined to give information regarding the mother's address, was committed for contempt.[2] Again, where the respondent, who was the paternal grandfather of certain pupil children, refused when ordered to do so to deliver them up or to state where they were, he was found guilty of contempt of Court.[3] Where a litigant was held to be in contempt the Court refused to allow a decree for expenses to be pronounced in name of his agent as agent disburser.[4]

SECTION 5.—JURISDICTION.

976. In Scotland every Court, whether civil or criminal, superior or inferior, has at common law an inherent right to punish for contempt. Erskine thus states the rule: "Every Judge, however limited his jurisdiction, is vested with all the powers necessary either for supporting his jurisdiction and maintaining the authority of the Court or for the execution of his decrees. Hence the Court of Session, though its jurisdiction be merely civil, has an inherent power of punishing those who insult any of the Judges while the Court is sitting or who shall obstruct the execution of its decrees." [5] The law of Scotland does not recognise the distinction which exists in England between the jurisdiction in matters of contempt of Court that can be exercised by Superior Courts of Record, Inferior Courts of Record, and Courts which are not Courts of Record.[6]

Contempt of Court is the subject of statutory regulation in certain local municipal Acts such as the Edinburgh Police Act, 1879, s. 341, and the Glasgow Police Act, 1866, s. 129.

SECTION 6.—PROCEDURE.

977. When the contempt occurs in Court, it is usually disposed of on the spot by the judge or magistrate before whom it was committed, who may, and generally does, act of his own motion. But if the party who commits the act of contempt is absent, the case may be disposed of summarily within a reasonable time thereafter, and by a judge or magistrate other than the one before whom it was committed.[1] When the contempt is not dealt with on the spot, the procedure is either (1) simply to ordain the party to appear at the bar, which is usually done on motion by the other party to the case; or (2) to proceed, if the matter is to be disposed of in the Court of Session, by a petition and complaint; if by the High Court of Justiciary, or in the Sheriff Court, by a petition; and if in a court of summary jurisdiction, by a complaint. The former course is generally adopted when the party fails to do something he is ordained to do, as in the case of *Leys*.[2] The latter course is adopted in cases where the party is ordered to abstain from doing a certain act, as in cases of breach of interdict. The prayer of the petition and complaint or petition may simply be to stop further publication or other act complained of, or it may also conclude for penalties. When a party refuses to appear at the bar when ordered to do so, an order for his apprehension will be granted; but when he appears at the bar, he will be heard in his defence as in other cases.

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[1] See *infra*, para. 980 *et seq.*

[2] *Muir* v. *Milligan*, 1868, 6 M. 1125.

[3] *Leys* v. *Leys*, 1886, 13 R. 1223. See also *Ross* v. *Ross*, 1885, 12 R. 1351; *Fisher* v. *Edgar*, 1894, 21 R. 1076.

[4] *Bloe* v. *Bloe*, 1882, 9 R. 894.

[5] Ersk. Inst. i. 2, 8. See also Stair, iv. 36, 7, 8; D. ii. 1, 2.

[6] Oswald on Contempt, 14, 15; *Ex parte Fernandez*, 1861, 10 C.B. (N.S.) 3; *Skipworth's* case, 1873, L.R. 9 Q.B., per Blackburn J. at p. 233.

SECTION 7.—PUNISHMENT.

978. The punishments inflicted are admonition, suspension from office in the case of parties practising before the Court,[3] or fine and imprisonment. Admonition is often a sufficient punishment for slight acts of contempt happening in Court, but it is rarely considered adequate where the contempt consists in disobedience to orders of Court. It was, however, the punishment inflicted in one case,[4] where a breach of interdict had been committed. But that case was very exceptional. Fine or imprisonment, or both, are the usual punishments. As to the amount of punishment, see L. Brougham in *Hamilton* v. *Caledonian Rly. Co.*[5] When it is imprisonment, it may be either for a definite or an indefinite period, as, for instance, until an order be obeyed. When a person is incarcerated for contempt, he is considered to be a "civil" and not a "criminal" prisoner, and his treatment is regulated by the special rules which are made from time to time, under the authority of the Secretary for Scotland, for "civil" prisoners, in terms of the Prisons (Scotland) Act, 1877.[6] It may here be mentioned that persons imprisoned for wilful failure to obey decrees for alimentary debts are considered civil prisoners, and treated in the same manner as prisoners committed for contempt of Court.[7]

SECTION 8.—REVIEW.

979. While, as stated above, every Court in Scotland has jurisdiction to deal with cases of contempt, the exercise of such jurisdiction is subject to review. The Court of review can decide whether the act complained of amounts to a contempt, and may recall or modify the sentence which has been imposed; in other words, it is the function of the Court of review (where appealed to) to decide whether the Court of first instance has properly exercised its jurisdiction.[1] Accordingly, a sentence for contempt pronounced by a Sheriff-Substitute may be appealed to the Sheriff or to the Court of Session.[2] Similarly a sentence pronounced by the Court of Session may be appealed to the House of Lords.[3] When a sentence of imprisonment is pronounced in an inferior Court, the proper remedy in order to obtain liberation is to present a Note of Suspension and Liberation to the High Court of Justiciary.[4] But when the sentence of imprisonment is pronounced by the Court of Session such a mode of review is incompetent.[5]

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[1] Hume, i. 406, ii. 138; *Petrie* v. *Angus*, 1889, 17 R. (J.) 3; 2 Wh. 358.

[2] *Supra.*

[3] *Hamilton* v. *Anderson*, 1856, 18 D. 1003.

[4] *Clark* v. *Stirling*, 1839, 1 D. 955.

[5] 1850, 7 Bell's App. 272.

[6] 40 & 41 Vict. c. 53, s. 47.

[7] Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42), s. 4 (6).

SECTION 9.—BREACH OF INTERDICT.

SUBSECTION (1).—*General.*

980. Interdict is a decree of Court prohibiting a person or persons from doing something which is specifically stated in the decree. If, therefore, a person who is thus prohibited does the act which he has been ordained not to do, he is guilty of a breach of interdict, and is liable to punishment as for "contempt of Court." The inadequacy of the phrase "contempt of Court" to indicate the true nature of this class of offence has been the subject of judicial comment. "The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice . . . it is not the dignity of the Court which is offended—a petty and misleading view of the issues involved—it is the fundamental supremacy of the law which is challenged." [6]

SUBSECTION (2).—*Petition and Complaint.*

981. When an interdict is broken and redress is desired the party who has obtained the interdict presents to the Court a Petition and Complaint praying the Court to find that the respondent "has been guilty of a breach of interdict . . . . and of a contempt of the authority of this Court; and in respect thereof to inflict such punishment by imprisonment, fine, or otherwise on the respondent" as to the Court may seem proper. A Petition and Complaint is of a quasi-criminal nature, and accordingly requires the concurrence of the Lord Advocate, or (in the Sheriff Court) of the Procurator-Fiscal, at least when there are penal conclusions in the prayer.[7] A Petition and Complaint, however, is not a criminal proceeding within the meaning of s. 3 of the Evidence Act, 1853, and accordingly the statutory rules relating to evidence in criminal proceedings do not apply. Thus the respondent and the wife or husband of the respondent are not only competent but compellable witnesses in such proceedings.[1]

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[1] *Hamilton* v. *Anderson*, 1856, 18 D. 1003, per Lord Justice-Clerk Hope at p. 1019.

[2] *Hamilton, supra*, and 3 Macq. 363; *Munro* v. *Matheson*, 1877, 5 R. 308.

[3] A. of S., 10th August 1784 (case of *James Carse*); *Hamilton* v. *Caledonian Rly. Co.*, 1850, 7 Bell's App. 272.

[4] *M'Leod* v. *Speirs*, 1884, 11 R. (J.) 26.

[5] Hume, ii. 509.

[6] Lord President Clyde in *Johnston* v. *Grant*, 1923 S.C. 789.

[7] *Duke of Northumberland* v. *Harris*, 1832, 10 S. 366; *Usher* v. *Mags. of Edinburgh*, 1839, 1 D. 639; *Paterson* v. *Robson*, 1872, 11 M. 76; *Stark's Trs.* v. *Duncan*, 1906, 8 F. 429.

982. The application of the complainer in respect of breach of interdict must be brought in the Court which granted the interdict, for it is the authority of that Court which has been disregarded. In the case of the Court of Session, however, a Petition and Complaint is an Inner House proceeding even though the interdict has been granted in the Outer House.[2] Where necessary the Inner House will authorise the Lord Ordinary on the Bills to proceed in the Petition and Complaint during vacation.[3] A Complaint for breach of interdict in the Sheriff Court is similar in form to the Petition and Complaint in the Court of Session, except that the concurrence of the Procurator-Fiscal is obtained instead of that of the Lord Advocate.[4] Alleged intention to commit a breach of interdict is not a sufficient ground for a Petition and Complaint.[5] Although a Petition and Complaint is a quasi-criminal proceeding, it has been held that it may be joined with an application for interdict against other parties in relation to the same subject.[6]

SUBSECTION (3).—*Procedure in Petition and Complaint.*

983. The procedure in a Petition and Complaint is regulated by the Act of Sederunt of 11th July 1828, ss. 83 to 90. The Petition and Complaint is boxed to the Inner House and appears in the Single Bills, when an order is taken for service upon the respondent and for answers in writing within fourteen days, and usually for the appearance of the respondent at the bar. If the respondent fails to appear when ordained to do so, an order for his apprehension will be granted.[7] In cases where the respondent appears and admits the breach of interdict the matter is at once disposed of; but if the alleged breach be denied, the Division may either decide to hear the Petition itself or may remit the matter to a Lord Ordinary if it shall seem expedient to do so. After answers have been lodged, or if the time for lodging answers has expired, the Petition and Complaint may be enrolled for further procedure before the Lord Ordinary or the Division as the case may be. If there is a plea to the relevancy this must first be disposed of.[8] If the alleged breach is denied a proof is allowed before either the Lord Ordinary or one of the

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[1] *Christie Miller* v. *Bain*, 6 R. 1215; *cf.* Criminal Evidence Act, 1898, ss. 1 and 4.

[2] Per Lord Curriehill in *M'Neill* v. *Scott*, 1866, 4 M. 608.

[3] *Dunoon Picture House Co.* v. *Mags. of Dunoon*, 1921 S.C. 908.

[4] *Henderson* v. *Maclellan*, 1874, 1 R. 920.

[5] *Hunter* v. *Wilson*, 1848, 10 D. 893.

[6] *Jolly* v. *Brown*, 1828, 6 S. 872.

[7] *Duke of Atholl* v. *Robertson*, 1872, 10 M. 298; *Welsbach Incandescent Gas Light Co.* v. *M'Mann*, 1901, 4 F. 395.

[8] *Henderson* v. *M'Lellan*, *supra*.

Judges of the Division;[1] or the proof may be taken on commission.[2] Notwithstanding the provisions of s. 86 of the Act of Sederunt of 11th July 1828, it is unusual to allow a jury trial.[3] In cases where the question whether there has been a breach of interdict is tried by a jury the Court will not order a new trial unless the very strongest grounds be shewn for setting aside the verdict.[4] In the case referred to the jury found for the respondents, and the Court expressed the opinion that though the Petition and Complaint was not in form a criminal proceeding the respondents should be treated as if they had tholed an assize.

984. Whatever form of inquiry is allowed, the first question is whether the interdict has been brought to the knowledge of the respondent. As to this it is sufficient if a copy of the interlocutor alone without a copy of the Note of Suspension and Interdict has been served on the party whose conduct is complained of. Any person, though he be neither a messenger nor a notary, may serve it, or it may be intimated by registered letter in accordance with the Citation Amendment (Scotland) Act, 1882. All that is required is evidence that the interdict has been made known to the party complained of, and this may be proved by parole.[5] Where there is an interdict for a specified period, and the interdict is thereafter continued and a breach of the renewed interdict has taken place, it has been held that personal intimation to the respondent of the renewal of the interdict is unnecessary.[6]

985. As a general rule an interdict affects only the parties named in it. There cannot, for instance, be an interdict against A. B. and all others,—though the interdict may be and very often is against "A. B. by himself or by others acting on his behalf." Accordingly a Petition and Complaint for breach of interdict against parties not named in the decree would in nearly every case be incompetent.[7] It has been decided, however, that where a person interdicted assumes a partner, and the new partnership proceeds to do what the original partner was interdicted from doing, a Petition and Complaint may be presented against the new partnership without the necessity of a fresh interdict.[8] When a person interdicted considers that he should no longer be subject to the interdict his remedy is to petition the Court for its recall. There may, for example, be such a change in the circumstances that existed when the interdict was obtained as no longer to entitle the party who obtained it to enforce it.[9]

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[1] *Dudgeon* v. *Thomson*, 1876, 3 R. 974; *M'Leod's Trs.* v. *Macpherson*, 1883, 10 R. 792; *Welsbach Incandescent Gas Light Co.* v. *M'Mann, supra.*

[2] *Menzies* v. *Macdonald*, 1864, 2 M. 652; *Mackenzie* v. *Coulthart*, 1889, 16 R. 1127.

[3] *Dudgeon* v. *Thomson, supra.*

[4] *Mackenzie* v. *Mags. of Dingwall*, 1839, 1 D. 487.

[5] Lord Mackenzie in *Clark*, 1839, 1 D. at p. 970; *Welsh* v. *Stewart*, 1818, 1 Murray 403–5; *Henderson* v. *M'Lellan*, 1874, 1 R. 920.

[6] *Henderson* v. *M'Lellan, supra.*

[7] *Pattison* v. *Fitzgerald*, 1823, 2 S. 536.

[8] *Dudgeon* v. *Thomson*, 1876, 3 R. 974; 4 R. (H.L.) 88; *Harvie* v. *W. & T. Ross*, 1886, 14 R. 71.

[9] *Lord Lovat* v. *Macdonell*, 1868, 6 M. 330; *Dudgeon* v. *Thomson, supra.*

Subsection (4).—*Punishment.*

986. This necessarily varies with the circumstances of each case. Even though the breach is not wilful it may be punished.[1] Where it is wilful the punishment may be a fine or imprisonment; and in addition the Court may ordain the respondent to find security that the offence will not be committed again, failing which an additional period of imprisonment may be imposed.[2] Only in very rare and exceptional cases will a wilful breach of interdict be punished merely by censure.[3] When a breach of interdict has been committed the respondent will be found liable in the expenses of the Petition and Complaint, and may be ordained to undo any operations which he has executed in breach of the interdict.[4] Although the party interdicted is cited to appear at the bar and must then appear, it is not absolutely necessary that he should be present when judgment is given. Thus in *Hamilton* (*supra*), where the Court inflicted only a fine, the respondents were not present. In another case,[5] where there was no fine imposed, but expenses were awarded against them, it was considered unnecessary for the respondents to be present personally at the bar,[6] and it has now been finally settled that sentence of fine or of imprisonment may be competently pronounced in the absence of the respondent.[7] In cases where sentence of imprisonment is pronounced, a duplicate copy of the interlocutor signed by the presiding Judge is a sufficient warrant for the respondent's committal to prison.[8]

Subsection (5).—*Review.*

987. Judgments pronounced in cases of breach of interdict are subject to review (unless, of course, where the judgment has been pronounced by a Supreme Court). Thus the judgment and sentence pronounced in a complaint for breach of interdict in the Sheriff Court is appealable to the Court of Session.[9] So also judgments of the Court of Session may be appealed to the House of Lords, who may modify the penalty.[10]

988. The rules above outlined apply equally to cases of breach of interim interdict.[11] And it has been held that an interim interdict granted before answers have been lodged does not expire in consequence of the process falling asleep.[12]

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[1] *Duke of Atholl* v. *Dalgleish*, 1823, 2 S. 442; *Walker* v. *Wishart*, 1825, 4 S. 302.

[2] *Hamilton* v. *Caledonian Rly. Co.*, 1847, 10 D. 41; *Gray* v. *Petrie*, 1849, 12 D. 85.

[3] *Clark* v. *Stirling*, 1839, 1 D. 955.

[4] *Lord Blantyre* v. *Dunn*, 1845, 7 D. 299.

[5] *Anderson* v. *Connacher*, 1850, 13 D. 405.

[6] See also *Walker* v. *Junor*, 1903, 5 F. 1035.

[7] *Stark's Trs.* v. *Duncan*, 1906, 8 F. 429.

[8] *MacLeod's Trs.* v. *Macpherson*, 1883, 10 R. 792.

[9] *Stark's Trs.* v. *Duncan*, *supra*.

[10] *Hamilton* v. *Caledonian Rly. Co.*, 1847, 10 D. 41; revd. 7 Bell's App. 272.

[11] *Robertson* v. *M'Donald*, 1829, 7 S. 272.

[12] *Hamilton* v. *Allan*, 1861, 23 D. 589.

CONTEXTURE.

See PROPERTY.

CONTINGENCY OF ACTIONS.

See PRACTICE AND PROCEDURE.

CONTINGENT DEBTS.

See SEQUESTRATION.

CONTINUATION OF THE DIET.

See CRIME (PROCEDURE) ; PRACTICE AND PROCEDURE.

CONTINUOUS VOYAGES.

See INTERNATIONAL LAW.

CONTRA BONOS MORES.

See ILLEGAL AND IMMORAL CONTRACTS ; MAXIMS.

CONTRA NON PRODUCTA.

See MAXIMS ; REDUCTION.

CONTRA NON VALENTEM NON CURRIT PRAESCRIPTIO.

See MAXIMS ; PRESCRIPTION.

CONTRABAND.

See CUSTOMS AND EXCISE.

CONTRABAND OF WAR.

See INTERNATIONAL LAW.

CONTRACT.

TABLE OF CONTENTS.

	PAGE
Definition	441
Analysis of Contract	442
Types of Contract: Constitution and Proof	443
Locus pœnitentiæ: Rei Interventus: Homologation	446
Capacity to Contract	447
Reality and Completeness of Consent: Void and Voidable Contracts	448
Communication of Intention: Offer and Acceptance	449
Consideration: Subject-Matter: Legality of Object	451
Variation of Contract	451
The Operation of Contract	454
Privity of Contract	454
Assignation	455
Specific Performance	456
Repudiation, Rescission, and Frustration	457
Proper Law of the Contract	460

SECTION 1.—DEFINITION.

989. Contract is defined by Pothier as "an agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other, to give some particular thing, or to do or abstain from doing some particular act." [1] The scope of this definition warrants the Scots usage of applying the qualified term "unilateral contract" to a self-imposed obligation, gratuitously undertaken by A., who promises to and engages himself with B. to give to him or others some particular thing, or to do or abstain from doing some particular act, from which some lawful benefit remains with or accrues to B., or to those others in whose interest the obligation is conceived. In this usage the obligation creates the contract. But in strictness of conception it is contract which creates the obligation, and accordingly the term is defined with greater accuracy as the "voluntary agreement of two or more persons whereby something is to be given or performed or abstained from upon one part, for a valuable consideration, either present or future, or a counter-engagement on the other part." [2]

990. The rule that an enforceable contract must arise from voluntary agreement appears to suffer exception in the case of a judicial contract which is constituted by lodging defences in a process at law.[3] On litiscontestation the parties are held as agreeing to accept the determination of the Court as fixing their respective rights and liabilities ; and the *medium concludendi* of the closed record delimits the basis on which the Court may determine the respective rights and liabilities of the parties. This agreement, however, which springs from the necessity of avoiding decree in absence, is truly a novation of the original contract, of which the agreement so to novate is necessarily an implied term.

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[1] Law of Obligations, i. 1, 3.

[2] Ersk. Prin. iii. 1, 6.

[3] Act 1672, c. 16, s. 19.

991. The strictures on Scots pleading by Lord Dunedin in *Black* v. *John Williams & Co.*,[1] and "*The Vitruvia*,"[2] have their logical basis in this doctrine of forensic novation. Where law implies the absence of an agreement so to novate, *e.g.* from the circumstances of the case,[3] and *a fortiori*, where such agreement is negatived by the express terms of the so-called contract itself,[4] the Court will not enforce the arrangement which is pretended as a contract. But, though the conveyance of land under the Lands Clauses Act is in truth compulsory, the notion of a contract of sale is properly applied to the transaction, because the service of a notice to treat operates as the acceptance of a statutory offer to sell any of the land within the limits of deviation, and the server of the notice cannot resile from the contract without the consent of the party notified, although only a lessee of the lands purchased.[5]

SECTION 2.—ANALYSIS OF CONTRACT.

992. The constituent elements of contract according to Savigny[6] are (i) several parties; (ii) an agreement of their wills; (iii) a mutual communication of this agreement; and (iv) an intention to create a legal relation between the parties. But law has no regard for the will *in se*: it only takes cognisance of will as manifested voluntarily in act or word. "Assent, in the sense of the law, is a matter of overt acts, not of unanimity in motives, design, or the interpretation of words."[7] That the only will recognised by the law is a state of mind reasonably inferred from overt acts was clearly stated by Blackburn J. in *Smith* v. *Hughes*:[8] "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe he was assenting to the terms proposed by the other party, and that the other party on that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." The existence of contract, therefore, does not depend upon an actual inner identity of will. It comes into being through the interchange of expressions of intention, and becomes actual when there is concurrence in a declaration of intention by which legal relations are determined.[9] It is in this sense that the voluntary agreement of Erskine's definition must be understood, and Savigny's analysis corrected.

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[1] 1924 S.C. (H.L.) 22.

[2] 1924 S.C. (H.L.) 31.

[3] *Balfour* v. *Balfour*, [1919] 2 K.B. 571.

[4] *Rose & Frank Co.* v. *J. R. Crompton & Bros., Ltd.*, [1923] 2 K.B. 261.

[5] *Lockerby* v. *City of Glasgow Improvement Trs.*, 1872, 10 M. 971; cf. *Ex parte Winder*, 1877, 6 Ch. D. 696; applied *Ex parte Burdett Coutts*, [1927] 2 Ch. 98. See COMPULSORY PURCHASE, *ante*, p. 261.

[6] System das Heutigen Romischen Rechts, iii. 308.

[7] Holmes J. in *O'Donnell* v. *Clinton*, 145 Mass. 461.

[8] 1871, L.R., 6 Q.B. 597, at p. 607, citing *Freeman* v. *Cooke*, 1848, 2 Ex. at p. 663.

[9] *Vide* Markby, Elements of Law, s. 608.

SECTION 3.—TYPES OF CONTRACT: CONSTITUTION AND PROOF.

993. By the Roman law, contracts were constituted either *re*, *i.e.* by the intervention of things, *verbis*, *scripto*, or *consensu*. According to Scots law, contracts are said to be real, consensual, or written. This classification is not of great value, for "every obligation to which writing is not indispensable is effectual where consent is proved."[1]

994. Under real contracts are included loan, commodate, pledge, deposit and certain innominate contracts. They are styled real because they require an act of delivery, payment, or possession to their completion. Consent alone will bind the party to complete the contract.[2] For proof of these parole testimony alone is required, except in the case of such innominate contracts as contain terms so unusual that they require to be proved by writing.

995. To consensual contracts belong sale, permutation, location, partnership, and mandate. All these contracts, unless parties stipulate for writing, may be proved by parole testimony.

996. "Written contracts, in strict technical language, are those to which authentic written evidence is required, not merely in proof, but in solemnity, as obligations relative to land; or obligations agreed to be reduced to writing; or those required by statute to be in writing. On other occasions writing is required only in evidence."[3] The rule of law that a sale of heritage cannot be effectually made except by writing which is either tested or holograph "admits of no exception or qualification."[4] Under the rule fall a contract of lease of heritage for more than a year,[5] a submission,[6] or a feu.[7] Even an offer to purchase heritage at a sale by public roup,[8] or the exercise of an option to purchase lands,[9] must be in a holograph or probative writing. Such writing is essential also for the constitution of a contract of service for more than one year;[10] and for proof, the opinion of Lord Low that "the rules of evidence applicable to contracts of service are substantially the same as those regarding contracts of lease"[11] is not likely now to be disputed. A parole agreement of lease for a period of years can only be proved by writing, or by the oath of party.[12] Writ or oath is essential to establish a loan of money exceeding £100 Scots, or to establish trust.[13] But the writ need not be holograph or tested.[1] It may only be the debtor's or trustee's writ constructively.

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[1] Bell, Prin., s. 16; Stair, i. 10, 11; Ersk. Inst. iii. 3, 1.

[2] Bell, Prin., s. 17; Stair, Ersk. *cit. supra*.

[3] Bell, Prin., s. 18.

[4] Lord President Inglis in *Scottish Lands and Buildings Co., Ltd.* v. *Shaw*, 1880, 7 R. 756, at p. 758.

[5] Stair, ii. 9, 4; Ersk. Inst. iii. 2, 2; *Skeen*, 1637, Mor. 8401.

[6] *A.* v. *B.*, 1617, Mor. 16829.

[7] *Rait* v. *Galloway*, 1833, 12 S. 131.

[8] Per Lords Deas and Ardmillan in *Shiell* v. *Guthrie's Trs.*, 1874, 1 R. 1083.

[9] *Hamilton* v. *Lochrane*, 1899, 1 F. 478.

[10] *Paterson* v. *Edingtons*, 1830, 8 S. 931; *Stewart* v. *M'Call*, 1869, 7 M. 544.

[11] *Reuter* v. *Douglas*, 1902, 10 S.L.T. 294.

[12] *Walker* v. *Flint*, 1863, 1 M. 417; *Fowlie* v. *M'Lean*, 1868, 6 M. 254.

[13] Bell, Prin., s. 2257; Stair, iv. 43, 4; Ersk. Inst. iv. 2, 20.

997. In *Haldane* v. *Speirs* [2] it was decided that a cheque in favour of the defender and indorsed by him did not instruct a loan, and that it was incompetent for the pursuer to prove by parole evidence the circumstances in which the cheque had been granted. But in the important and unreported case of *Westwood* v. *Cassells*,[3] where a trust was held to be established by writ, the indorsation of some periodical cheques was the only actual writing of the defender produced. A. borrowed from his uncle B. the sum of £1000 on the security of his public-house, the transaction taking the form of an *ex facie* absolute disposition of the property. When A. wanted to repay the loan B. maintained that he had bought the property, which had increased greatly in value. A. brought an action of declarator of trust and for reconveyance. A commission was taken for the recovery of correspondence between the parties, and of cheques in B.'s favour drawn by A.'s law-agent on the bank account of his firm. Some half-yearly cheques for £25, and others for £25 less income-tax were produced which had been indorsed by B. and credited to his account with the bank. The counterfoils of the law-agent's cheque-book corroborated the payee, the amounts, and the dates of payment, and the law-agent himself, the principal letters not having been recovered, produced his firm's letter-book and proved the contents of letters of even date with the respective cheques, all addressed to B., and two of them bearing in express terms to enclose a cheque "in payment of interest on your loan of £1000." The Lord Ordinary (Johnston) held that the trust had been proved *scripto*, and on a reclaiming note the Second Division adhered.

998. Writing was made necessary to valid cautionary obligations by s. 6 of the Mercantile Law Amendment Act, 1856.[4] The purpose of that Act, as shown by the preamble, of assimilating Scots and English law, favours the view that the provision applies to the method of proof,[5] but in this, as in many other cases, it is a matter of mere academic interest whether it is for the constitution of a contract or merely *in modum probationis* that writing is required.[6] Lord Dunedin has pointed out that there is "no case which is authority for the view that an obligation to pay money, not incidental to one of the well-known consensual contracts, is provable in the law of Scotland otherwise than by writ or oath," [7] but he expressed the view, in which Lord Kinnear concurred, that the whole question of the mode of proof in such cases deserved reconsideration.[1] The rule that except in the case of cash transactions,[2] periodical payments like wages, or a series of transactions,[3] payments of money can only be proved by writ or oath of the payee[4] is subject to modification, which has been thus expressed by Lord Skerrington: "A defender may prove facts and circumstances which give rise to the inevitable inference that the debt has been satisfied or discharged in some way or other."[5] It is thought that a corresponding exception might properly be recognised in the case of obligations to pay money—unless the pursuer avers facts and circumstances which cannot be reasonably reconciled with the non-existence of the obligation. The cases of most significance for the method of proof of an innominate contract, prior to *Smith* v. *Reekie*,[6] are collected in Gloag on Contract.[7]

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[1] *Paterson* v. *Paterson*, 1897, 25 R. 144. See the instructive opinion of Lord Kyllachy (Ordinary) in *Bryan* v. *Butters*, 1892, 19 R. 490, at pp. 492–4.

[2] 1872, 10 M. 537.

[3] Decided by Lord Johnston in the Outer House in Jan. 1907. Cf. *Miller* v. *Oliphant*, 1843, 5 D. 856, where the Court held that the defender was not restricted to the writ or oath of the pursuer in proof of an averment of trust, when the pursuer was suing for the balance of the price of subjects mentioned in an *ex facie* absolute disposition bearing that the full price had been paid.

[4] 19 & 20 Vict. c. 60.

[5] *Vide* the opinion of Lord Wellwood (Ordinary) in *Wallace* v. *Gibson*, reported at 1895, 22 R. (H.L.) 58.

[6] *Wallace* v. *Gibson*, 1895, 22 R. (H.L.) 56, per Lord Watson at p. 66.

[7] *M'Fadzean's Exr.* v. *Robert M'Alpine & Sons*, 1907 S.C. 1269, at p. 1273.

999. "When you have a proposal or agreement made in writing expressed to be subject to a contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement, the terms of which are not expressed in detail."[8] The same is true of a parole agreement. But it is not enough that both parties obviously contemplated the execution of a formal deed embodying the terms agreed to,[9] or that one party had expressly stipulated for that in his acceptance of an offer.[10] The reduction to writing or formal execution must be a suspensive condition of the agreement if either party is to be entitled to resile.[11] This right was excluded when the offer of a lease containing all the essentials of that contract was accepted "subject to a lease to be drawn up in due form." [1] So, also, when an offer was made to buy a house, and "if offer accepted, to sign contract on the auction particulars"; this was accepted "subject to contract as agreed"; the offerer declined to sign the draft contract in terms of the auction particulars, but it was held that his signature was unnecessary, the acceptance having constituted a complete contract.[2] On the other hand, where the defendant had agreed in writing to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract," and no other contract was ever entered into between the parties, it was held that there was no final agreement of which specific performance could be enforced.[3]

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[1] Compare *Smith* v. *Reekie*, 1920 S.C. 188, at p. 192.

[2] *Shaw* v. *Wright*, 1877, 5 R. 245.

[3] *Smith's Trs.* v. *Smith*, 1911 S.C. 653.

[4] Bell, Prin., s. 565; Ersk. Prin. iii. 4, 3.

[5] *A. & A. Campbell* v. *Campbell's Exrs.*, 1910, 2 S.L.T. 240. Cf. *Young* v. *Thomson*, 1909 S.C. 529, where payment was held to have been proved *scripto* by inference from a practice of payments recorded in a book, which had been lost in the creditor's hands. Also *Bishop* v. *Bryce*, 1910 S.C. 426, where it was held competent to prove by parole that an I.O.U. in the creditor's possession should have been delivered up.

[6] 1920 S.C. 188.

[7] Gloag on Contract, pp. 320–1.

[8] Per Jessel M.R. in *Winn* v. *Bull*, 1877, 7 Ch. D. 29, at p. 32; Lord Westbury in *Chinnock* v. *Marchioness of Ely*, 1865, 4 De G. J. & S. 645, 646; *Rossiter* v. *Miller*, 1877, 5 Ch. D. 648; 1878, 3 App. Cas. 1124; *Gordon's Exrs.* v. *Gordon* (H.L.), 1918, 55 S.L.R. 497; 1918, 1 S.L.T. 407.

[9] *Dewar* v. *Ainslie*, 1892, 20 R. 203; *Bonnewell* v. *Jenkins*, 1878, 8 Ch. D. 70, per James L.J. at p. 73.

[10] *Erskine* v. *Glendinning*, 1871, 9 M. 656. Actual cases need to be approached in the light of Lord Cranworth's dictum: "The circumstance that the parties do intend a subsequent agreement to be made is strong evidence that they did not intend the previous negotiations to amount to an agreement"; *Ridgway* v. *Wharton*, 1856, 6 H.L.C. 238, 264, 268.

[11] Bell, Com. i. 328.

SECTION 4.—LOCUS PŒNITENTIÆ: REI INTERVENTUS: HOMOLOGATION.

1000. *Locus pœnitentiæ* is a legal metaphor used to indicate the existence of a right to resile from an inchoate or imperfectly constituted contract. This right never exists in cases of contract which can be instructed by proof at large. In cases where a particular modus of constitution is absolutely essential, *e.g.* by the prescription of statute, the right continues until the due formalities have been interponed. In the intermediate class of contracts—where certain formalities are exacted by the common law (as when heritage is sold or let) there is *locus pœnitentiæ*, if these formalities have not been observed, unless the party who desires to resile has allowed something to be done on the faith of the informal contract (*rei interventus*), or has done something himself (Homologation), which would make it inequitable for him to retract.

1001. The doctrine of *rei interventus* performs two distinct functions in the law of contract. It is pleadable in bar of repudiation of an obligation otherwise, though informally, instructed. Its higher function is to raise an effective presumption of an agreement not otherwise instructed.

In the one case the *res interveniens* must be considerable, known to the obligor, and unequivocably referable to the agreement, on the faith of which it occurs.[4] The doctrine cannot, therefore, be invoked in the case of an innominate contract not instructed by writing.[5] In the second case the *res* must be very costly or must consist in something which cannot be undone and must have intervened with the knowledge of the contracting party who had the natural right to prevent it.[6]

1002. An informal contract may be set up by homologation. "Contracts and obligations in themselves informal or voidable, receive strength by the contractor who has an interest to repudiate them or his heirs or assignees doing any act thereafter which imports an approbation of them, and consequently supplies the want of an original legal formality; or, rather, bars repudiation."[1] The plea of bar is elided if the act founded on can be ascribed to any other cause.

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[1] *Erskine* v. *Glendinning*, 1871, 9 M. 656; *Smeaton* v. *St. Andrews Police Commrs.*, 1868, 7 M. 206, revd. 1871, 9 M. (H.L.) 24.

[2] *Filby* v. *Hounsell*, [1896] 2 Ch. 737.

[3] *Winn* v. *Bull*, 1877, 7 Ch. D. 29; *Coope* v. *Ridout*, [1921] 1 Ch. 291.

[4] Bell, Prin., s. 26. Approved by Chelmsford L.C. in *Wark* v. *Bargaddie Coal Co.*, 1859, 3 Macq. 467, at p. 477,

[5] *Edmondston* v. *Edmondston*, 1861, 23 D. 995; Ersk. Prin. iii. 3, 15.

[6] Bell, Prin., s. 946. Approved by Chelmsford L.C. in *Wark* v. *Bargaddie Coal Co.*, *supra*, at p. 479 *seq.*

1003. It is thought significant of the metaphysical temper of Scotland that the law of marriage—the highest form of contract—should recognise so clearly in its irregular forms both the essence of contract and the reality of its constitution. *Per verba de præsenti:* the simplest interchange of serious matrimonial intention transforms man and woman into man and wife. In promise *subsequente copula*, which is *ipsum matrimonium*, the inchoate contract is completed by *rei interventus*. Marriage by habit and repute, it seems, may either be attributed to the doctrine of *rei interventus* in its higher form; or it may, and more reasonably on account of the term of years required for it, be regarded as a species of homologation *de anno in annum* of an agreement to marry, *i.e.* real marriage as distinguished from a social or religious ceremony in implement of a formal promise.

Section 5.—Capacity to Contract.

1004. Parties to a contract are not bound unless the law recognises them as capable of giving valid consent. The State cannot be a party in a contract. It is the ideal entity with absolute independence whose existence is the prerequisite of contract. But the concrete forms in which the ideal entity is realised, called departments, show a self-limitation of the State in having contracts enforced against them. The immunity in contract (so-called) which is enjoyed by foreign states and their accredited representatives in this country, recognised in the form of "No jurisdiction," is derived by the comity of nations from the theory of the absolute independence of the sovereign.[2]

1005. Since the common law disabilities of married women in contract have been removed by statute, the chief causes of incapacity are (1) the status of national enemy, (2) defect of age, (3) artificial personality, and (4) the permanent or temporary mental aberration of lunacy or drunkenness. The measure and consequences of the operation of incapacity in these cases may be found under their respective titles. Here it may be observed that enemy status depends not on nationality but on the place of residence or business,[3] so that in the case of a British subject in residence or carrying on business abroad a contract may be void both on the ground of incapacity and illegality. Liability to pay for necessaries is imposed on persons of defective capacity by the Sale of Goods Act.[4]

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[1] Ersk. Prin. iii. 3, 15.

[2] *Mighell* v. *The Sultan of Johore*, [1894] 1 Q.B. 149; *The Parlement Belge*, 1880, 5 P.D. 197; *Macartney* v. *Garbutt*, 1890, 24 Q.B.D. 368.

[3] *Porter* v. *Freudenberg*, [1915] 1 K.B. 857.

[4] 56 & 57 Vict. c. 71, s. 2. The provision was in Scotland probably declaratory of the common law.

The scope of contractual incapacity in the case of *personæ* of artificial construction depends on the *modus creandi*. If the personality is the creation of common law as in the case of a firm, the special limitations depend on the rules of agency alone, for no partner has a mandate to commit the firm outwith its proper line of business. At common law a corporation created by the King's charter can deal with its property or bind itself by contract like an ordinary person.[1] But a corporation created by or in pursuance of statute is limited to the exercise of such powers as are actually conferred by or may reasonably be deduced from the language of the statute, or the memorandum under which it is incorporated. A contract *ultra vires* of the corporation is void, not by reason of the illegality of the object of the contracting parties, but on account of the incapacity of the statutory contractor.[2] The avoidance of a contract by an insane person does not depend in Scotland upon the other contractor's knowledge of the mental deficiency. While the case of *Taylor* v. *Provan* [3] shows that a man has no duty to abstain from dealing with one who is in a state of partial intoxication, the case of *Harvey* v. *Smith* [4] shows with equal clearness that he who does so, at least if he is or employs a law-agent, is liable to be met with an unexpected application of the law of estoppel.

SECTION 6.—REALITY AND COMPLETENESS OF CONSENT: VOID AND VOIDABLE CONTRACTS.

1006. Parties to a contract must not only be capable of giving consent to a contract, but the consent given by them must be real and complete, not merely apparent or fictitious or partial. "It is necessary to an effectual obligation that the contracting parties shall be agreed on all the essential points [5] of the engagement. There must be no error in the substantial parts of the agreement, destroying consent; no constraint such as to overmaster a mind of ordinary vigour; no fraud, giving birth to the contract and misleading the objector as to its true nature and substance." [6] An agreement in which the Court cannot find *termini habiles* for a decree of specific implement is not a contract in the eyes of the law,[7] though there are cases of actual contract in which considerations of equity or of policy prevent the Court giving that remedy to a complainer. But this does not mean that all the terms must be specifically expressed in the contract, if the Court can supply them *aliunde*, *e.g.* from market prices or rates in an ordinary case, or on a valuation or *quantum meruit* basis in a contract that is clearly defined otherwise than as to price.[1] Consent is excluded and there is no completed contract where parties enter into an agreement with reference to something which, unknown to them, has already ceased to exist.[2]

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[1] Per Bowen L.J. in *Baroness Wenlock* v. *River Dee Co.*, 1887, 36 Ch. D. 674, at p. 685.

[2] *Ashbury Railway Carriage and Iron Co.* v. *Riche*, 1875, L.R. 7 H.L. 653.

[3] 1864, 2 M. 1226.

[4] 1904, 6 F. 511.

[5] *Vide* Lord Watson's approval of Bell's enumeration of essentials in Bell's Prin., s. 11; *Stewart* v. *Kennedy*, 17 R. (H.L.), at p. 28.

[6] Bell, Com., 7th ed., i. 313.

[7] *Macarthur* v. *Lawson*, 1877, 4 R. 1134; *Traill* v. *Dewar*, 1881, 8 R. 583. See Gloag on Contract, p. 12 *sqq*.

1007. There is this distinction between the effect of error and the effect of fraud on a contract. In the former case there is no consent, and the contract is void, *i.e.* it may be set aside, even although third parties have acquired rights thereunder. In the latter case there is apparent consent induced by trickery or device, and the contract is said to be voidable, not void, *i.e.* it can only be set aside while matters remain intact, and if the rights of third parties *bona fide* acquired are not thereby prejudiced.[3] As between the immediate parties to a voidable contract *restitutio in integrum* is not so absolute a condition that rescission is barred, if in the meantime the subject of the sale has depreciated in value,[4] or even perished without default of the vendor.[5] But a member of a company, who was induced to take his shares by misrepresentation, cannot disaffirm his contract after the shares have become a source of liability through the presentation of a winding-up petition on which a winding-up order is subsequently made.[6] And if, after discovering the fraud, a contractor takes any benefit under the agreement, or does anything to affirm it, he loses his option to repudiate the contract, and is confined to the remedy, if any, of damages.

SECTION 7.—COMMUNICATION OF INTENTION: OFFER AND ACCEPTANCE.

1008. Parties to a contract must communicate to each other their intention to be bound. This is effected by means of offer and acceptance. An offer may be express or implied, *i.e.* inferred from facts and circumstances. It may be made either to an individual or to the public generally, *e.g.* by advertisement or circular. The words used must indicate a definite offer, and not merely an offer to deal which calls for a counter offer, as in the case of a sale by auction. Offer is to be distinguished from promise.[7] It implies something to be done by the other party, and is only binding on the offerer when accepted by the offeree.[8] Acceptance, therefore, clinches the bargain. But the acceptance must exactly meet the offer, which must be taken subject to the qualifications and limitations with which it is made. To import new terms or conditions into the acceptance is in effect to make a new offer, which must, in its turn, be accepted before the contract is concluded.[1]

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[1] *Acebal* v. *Levy*, 1834, 10 Bing. 376 (executed contract of sale); *Hoadly* v. *M'Laine*, 1834, 10 Bing. 482 (executory contract); *Valpy* v. *Gibson*, 1847, 4 C.B. 837; Sale of Goods Act, 1893, s. 8.

[2] *Couturier* v. *Hastie*, 1856, 5 H.L.C. 673.

[3] Bell, Prin. ss. 11–14; Bell, Com. i. 313; *Babcock* v. *Lawson*, 1879, 4 Q.B.D. 394.

[4] *Western Bank of Scotland* v. *Addie*, 1867, 5 M. (H.L.) 80, per Lord Cranworth at p. 90; *Head* v. *Tattersall*, 1871, L.R. 7 Ex. 7.

[5] *Head* v. *Tattersall*, *supra*, per Bramwell B. at p. 10; cf. *Adam* v. *Newbigging*, 1888, 13 App. Cas. 308.

[6] *Kent* v. *Freehold Land Co.*, 1868, L.R. 3 Ch. 493; *Oakes* v. *Turquand*, 1867, L.R. 2 H.L. 325; *In re General Rly. Syndicate: Whiteley's* case, [1899] 1 Ch. 770; *Western Bank* v. *Addie*, *supra*.

[7] *Malcolm* v. *Campbell*, 1891, 19 R. 278.

[8] *J. M. Smith, Ltd.* v. *Colquhoun's Tr.*, 1901, 3 F. 981.

1009. Acceptance must be made *debito tempore*,[2] *i.e.* within the time specified by the offer or, when no time is specified, within a reasonable time,[3] and before withdrawal of the offer.[4] Acceptance may be express, or implied from facts and circumstances.[5] Except where thus implied, an acceptance, in order to be operative, must be communicated to the offerer. Where, however, parties correspond by letter or telegram, it is held that the post-office is the agent of the offerer; the bargain is clinched when the acceptance is posted, but not when it is handed to a postman for postage:[6] recall of the offer subsequent to that date is ineffectual, and the offerer is bound although the acceptance be delayed in the transmission, or is lost, or fail to reach him.[7] The place from which the reply concluding the contract is dispatched is held to be the place where the contract was made.[8] Although the offer is not made by post, the bargain is complete as soon as the acceptance is posted, if that means of communication must have been within the contemplation of parties.[9] But acceptance is not communicated when it is made in a different manner from that prescribed or indicated by the offerer.[10]

1010. An offer may, in the absence of an undertaking to keep it open for a specified period of time, be withdrawn any time before acceptance,[11] but the revocation of an offer is of no effect until brought to the mind of the person to whom the offer was made, and therefore a revocation sent by post does not operate from the time of posting it.[12] It is probable that the acceptor would not be held bound if withdrawal of his acceptance reached the offerer before or at the same time as the acceptance.[13]

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[1] *Johnston* v. *Clark*, 1855, 18 D. 70; *Jack* v. *Roberts & Gibson*, 1865, 3 M. 554; *Canning* v. *Farquhar*, 1886, 16 Q.B.D. 727; see *Harvey* v. *Smith*, 1904, 6 F. 511, per Lord Kinnear at p. 521 *et seq.*

[2] *Glasgow, etc. Steam Shipping Co.* v. *Watson*, 1873, 1 R. 189, per Lord Pres. Inglis at p. 193.

[3] *Hall-Maxwell* v. *Gill*, 1901, 9 S.L.T. 222; *Thomson* v. *James*, 1855, 18 D. 1, per Lord President and Lord Deas; see *Glasgow Steam Shipping Co.*, *ut supra*; cp. Bell, Com. i. 343; *Murray* v. *Rennie & Angus*, 1897, 24 R. 965, per Lord Pres. Robertson at p. 970.

[4] *J. M. Smith, Ltd.* v. *Colquhoun's Tr.*, 1901, 3 F. 981.

[5] See analysis of contracts constituted by purchase of railway, car, concert tickets, etc., in Pollock on Contract, ch. i.; *Carlill* v. *Carbolic Smoke Ball Co.*, [1893], 1 Q.B. 256—contract constituted by compliance by a member of the public with conditions in advertisement offering reward.

[6] *London and Northern Bank, In re: ex parte Jones*, [1900] 1 Ch. 220.

[7] Pollock on Contract, p. 40 App. Note B; *Household, Fire, and Carriage Accident Insurance Co.* v. *Grant*, 1879, 4 Ex. D. 216; *Dunlop* v. *Higgins*, 1848, 6 Bell's App. 195; *Byrne* v. *Van Tienhoven*, 1880, 5 C.P.D. 344.

[8] Westlake, Private International Law, s. 224.

[9] *Henthorn* v. *Fraser*, [1892] 2 Ch. 27; cf. *Jacobsen Sons & Co.* v. *Underwood & Son*, 1894, 21 R. 654.

[10] *Eliason* v. *Henshaw* (American), 1819, 4 Wheaton 225; *Hebb's* case, 1867, L.R. 4 Eq. 9.

[11] *J. M. Smith, Ltd.* v. *Colquhoun's Tr.*, 1901, 3 F. 981.

[12] *Henthorn* v. *Fraser*, *supra*.

[13] *Countess of Dunmore* v. *Alexander*, 1830, 9 S, 190,

SECTION 8.—CONSIDERATION: SUBJECT-MATTER: LEGALITY OF OBJECT.

1011. Contract being a mutual obligation, both parties must be bound, or neither. The consideration inducing anyone to enter into a contract is the obligation undertaken towards him by the other. From the definition of contract given above, it is seen that one of the essentials thereof is valid consideration given to the parties contracting. By this, however, it is not meant that the consideration should be an adequate return for the obligation undertaken, but merely that it should not be elusory. A serious inadequacy of consideration, however, may be an important element in raising the presumption of undue influence or fraud,[1] and in a case of fraud against creditors the transaction will be held gratuitous *quoad excessum*.[2] The subject-matter of the obligation undertaken by either party may be either a fact or a thing. But things exempted from commerce, either by nature, by the destination of the owner, or by statute, cannot be the subject of obligations. And as regards facts, a man is not bound by his contract where he obliges himself to do what is naturally or legally impossible.[3] "But all facts in themselves possible are proper subjects of obligation though they should be beyond the power of the party bound, who ought not to have undertaken what he knew or might suspect could not be performed by him." [4]

SECTION 9.—VARIATION OF CONTRACT.

1012. The *locus classicus* of the law of Scotland on the variation of a formal contract is the judgment of Lord Kyllachy [5] in the case of a mineral lease, where the lessees maintained that the conditions of the lease had been abrogated by agreement, express or tacit, or by acquiescence by the landlords in the mode of working which they challenged in the action. "(1) A lease may have its provisions varied by a subsequent agreement expressed in a probative writing. That is of course clear. (2) The same result may follow from an improbative written agreement followed by *rei interventus*, or from a verbal agreement proved by writ or oath, and followed by *rei interventus*. The rule, so far, is the same as in the constitution of contracts relating to heritage.[6] (3) A lease may also be altered by a verbal agreement proved by parole, if followed by actings contrary to the lease, and in pursuance of the agreement. At least it may be so to the effect of justifying, or barring challenge of, the particular acts done.[1] (4) Apart from express agreement, written or verbal, consent to a particular contravention may be implied from knowledge and non-objection—that is to say, from acquiescence on the part of the landlord, and such acquiescence may be proved by parole.[2] (5) Apart also from express agreement, a lease may be altered *rebus ipsis et factis*—that is to say, it may be altered, both for the past and the future, by acts of the parties, necessarily and unequivocally importing an agreement to alter, and such acts of the parties may be proved by parole." [2] Founding on the opinion of the Lord President (Robertson) [3] on the reclaiming note against Lord Kyllachy's judgment, the late Professor Rankine adds,[4] "It may be that the last mode may be effective only when what has been done with the consent and approval of the landlord renders it impossible, without altogether unreasonable loss, to revert to the scheme of the lease, and where the past permission or tolerance must be held to have implied consent for the future."

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[1] *Wood* v. *Abrey*, 1818, 3 Mad. 423. See Indian Contract Act, s. 25, expl. 2, which is said by Pollock, Contract, p. 668, to be a good expression of the true doctrine.

[2] *Glencairn* v. *Brisbane*, 1677, Mor. 1011.

[3] See ILLEGAL AND IMMORAL CONTRACTS.

[4] Stair, i. 10, 13; ii. 3, 56; Ersk. iii. 3, 84; Bell, Com., 7th ed., i. 313. Cf. *Gillespie & Co.* v. *Howden & Co.*, 1885, 12 R. 800; *Thorn* v. *Mayor and Commonalty of London*, 1876, 1 App. Cas. 120.

[5] *Carron Co.* v. *Henderson's Trs.*, 1896, 23 R. 1042, at p. 1048 *seq.*

[6] *Gowans Trs.* v. *Carstairs*, 24 D. 1382; *Walker* v. *Flint*, 1863, 1 M. 417; *Gibson* v. *Adams*, 1875, 3 R. 144.

1013. A bargain contained in a written offer and acceptance "cannot be altered by parole evidence as to what negotiations there were which led up to the bargain, or upon what footing that bargain was gone into." [5] Whether and how far this rule of the common law has been modified in the case of bills of exchange cannot be said to be satisfactorily determined.[6] Lord Trayner in *Dryburgh & Co.* v. *Roy* [7] was of opinion that where the question is one of liability, the Act has introduced an exception to the general rule that parole evidence is inadmissible to enable an obligant to contradict or modify his written obligation, and his opinion was followed in *Viani* v. *Gunn & Co.*,[8] in the same Division, and by Lord Skerrington in the Outer House in *Harker* v. *Pottage*.[9] It is thought that the opinion cannot be reconciled with the views expressed by Lord President Dunedin in *Stagg and Robson* v. *Stirling*,[10] and in *M'Allister* v. *M'Gallagley*,[11] although the actual decisions in these cases proceeded on the ground that the bills in question were granted in execution of a written agreement. See BILLS OF EXCHANGE.

1014. Where a contract has to be found in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which passed between the parties must be taken into consideration.[12]

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[1] Cf. *Bargaddie Coal Co.* v. *Wark*, 1859, 3 Macq. 467; *Kirkpatrick* v. *Allanshaw Coal Co.*, 1880, 8 R. 327.

[2] *Bargaddie Coal Co.* v. *Wark*, *supra*.

[3] *Carron Co.* v. *Henderson's Trs.*, 1896, 23 R. at p. 1053.

[4] Rankine on Leases, 3rd ed., p. 113.

[5] Per Lord Dunedin in *M'Allister* v. *M'Gallagley*, 1911 S.C. 112, at p. 117; Bell, Prin. ss. 524, 2258; *Inglis* v. *Buttery & Co.*, 1878, 5 R. (H.L.) 87; cf. *Lee* v. *Alexander*, 1883, 10 R. (H.L.) 91, at pp. 96, 99.

[6] 45 & 46 Vict. c. 61, s. 100.

[7] 1903, 5 F. 665, at p. 669.

[8] 1904, 6 F. 989.

[9] 1909, 1 S.L.T. 155.

[10] 1908 S.C. 675, at p. 679.

[11] 1911 S.C. 112; and see the view of Lord Pres. Inglis in *National Bank of Australasia* v. *Turnbull & Co.*, 1891, 18 R. 629, at pp. 634, 635, and *contra* Lord Adam at p. 637.

[12] *Hussey* v. *Horne-Payne*, 1879, 4 App. Cas. 311; *May* v. *Thomson*, 1882, 20 Ch. D. 705; *Jones* v. *Daniel*, [1894] 2 Ch. 332.

The conflict of judicial opinion in the case of *Hussey* is instructive. The Vice-Chancellor (Malins) held that the first two letters (offer and acceptance) constituted a completed agreement; that what followed was of the nature of negotiations; and that these negotiations did not constitute a legal abandonment of the contract. His judgment was reversed by the Court of Appeal on the ground that the acceptance in the second letter was vitiated as an acceptance by the introduction of a new term, viz. a stipulation that the sale was to be subject to the title being approved by the solicitors of the purchaser. The House of Lords upheld the decision of the Court of Appeal, but on a different ground. They held, having regard to the whole of what had passed in letters and conversation, that no concluded and complete contract had been established. The case is also of importance for the caveat of the Lord Chancellor (Cairns) regarding the effect of an added stipulation for the approval of title by the purchaser's solicitor.[1] In a case where an offer was invited by letter, made by wire, and accepted by letter, it was held by the First Division that a letter written by the offerers on the day they sent the wire, but not received till the offer had been accepted, in which they stated that certain conditions under which the offer was invited could not be complied with, was not a document forming part of the contract, but that its terms might be looked at as containing an explanation of what was meant by an elliptical expression in their telegram.[2]

1015. A verbal agreement can of course be altered verbally. But difficulties may arise with regard to the mode of variation and the competent methods of proof, where a verbal agreement has been put in writing. It does not *eo ipso* become a written contract, though, it is thought, a pursuer who comes into Court founding upon the writ is not entitled to go *dehors* the document. In the case of *Ireland & Son* v. *Rosewell Gas Co.*,[3] Lord Kyllachy in the Outer House said: "I am not prepared, as at present advised, to assent to the proposition that a verbal agreement, relating to the sale of moveables, followed by *rei interventus*, requires to be proved *scripto*, even where it involves a displacement or variation of an existing written agreement." The Second Division adhered to the allowance of parole evidence. If a written memorandum of a verbal contract has been expressly accepted or not timeously repudiated, the party accepting cannot contradict its terms by proving a different previous verbal bargain.[4] But parole evidence is allowed to prove a term collateral to the main heads of the agreement recorded in the writ, or to clear up a doubt about the meaning of the confirming letter.[5] It may be added that if in a written contract, *e.g. locatio conductio operis*, an option is reserved to the obligor which entitles him to modify or add to the specification of work agreed on, the exercise of the option within the limits of the reservation does not constitute a variation of the contract or a new agreement, and the obligor remains bound to complete the work in the contract time, unless he in turn has stipulated for an extension appropriate for or corresponding to the modification or addition to the original specification.[1] But release from an absolute time limit in a contract may be operated through the failure of the obligor to satisfy implied conditions or make arrangements that were necessary to enable the work to be completed within the specified time.[2]

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[1] At pp. 321–2.

[2] *Jaeger Brothers, Ltd.* v. *J. & A. M'Morland*, 1902, 10 S.L.T. 63.

[3] 1900, 37 S.L.R. 521; 7 S.L.T. 295, at p. 296.

[4] *Riemann* v. *John Young & Co.*, 1895, 2 S.L.T. 426 (Lord Kincairney).

[5] *Croudace* v. *The Annandale Steamship Co.*, 1925, S.L.T. 449 (Lord Constable).

SECTION 10.—THE OPERATION OF CONTRACT.

SUBSECTION (1).—*Privity of Contract.*

1016. The general rule is that no one but the parties to a contract can be bound by it or entitled under it.[3] It is not a real exception to the rule that an undisclosed principal acquires rights and incurs liabilities under a contract which was made by his agent, even with a contractor who was unaware of the fact of agency; or that the terms of a contract may constitute one of the parties trustee for a third person.[4] But the rule does suffer exception where the terms of a contract create a *jus quæsitum tertio*, either expressly or by necessary implication.[5] "The *jus quæsitum* must be not merely a *jus* in which the *tertius* is interested, but it must be a *jus* that was intended to be beneficial to a third person."[6] Mere reference by name to a third person who would be benefited by the contract does not give him a title to enforce it; his benefit must be an object of the contract.[7] Mere identity of restrictions appearing in the titles granted by one superior to adjacent feuars does not confer on a vassal the right to insist on their observance by a co-feuar;[8] mutuality of obligation must be established otherwise, by express stipulation in their respective contracts, or by reasonable implication from some reference in each contract to a common plan or scheme of building.[9] If validly created by an agreement which is revocable by the parties to it, a *jus quæsitum* may be enforced by the *tertius* so long as the agreement has not been in fact revoked.[1] Where a *tertius* has no interest or right to enforce a contract, his defect of title cannot be cured by the consent and concurrence of the proper creditor in the obligation.[2]

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[1] *Jones* v. *St. John's College*, 1870, L.R. 6 Q.B. 115.

[2] *T. & R. Duncanson* v. *The Scottish County Investment Co., Ltd.*, 1915 S.C. 1106.

[3] *In re Empress Engineering Co.*, 1880, 16 Ch. D. 125; *Henderson* v. *Stubbs, Ltd.*, 1894, 22 R. 51; *Finnie* v. *Glasgow and South-Western Rly. Co.*, 1857, 3 Macq. 75.

[4] *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London), Ltd.*, [1919] A.C. 801.

[5] *Rose, Murison & Thomson* v. *Wingate, Birrell & Co.'s Tr.*, 1889, 16 R. 1132; *Lamont* v. *Burnett*, 1901, 3 F. 797.

[6] *Finnie* v. *Glasgow and South-Western Rly. Co.*, *supra*, per Cranworth L.C. at p. 88.

[7] *Blumer & Co. and Ellis & Sons* v. *Scott & Sons*, 1874, 1 R. 379; see per Lord Ardmillan at pp. 386–7; *Robertson* v. *Fleming*, 1861, 4 Macq. 167

[8] *Hislop* v. *MacRitchie's Trs.*, 1881, 8 R. (H.L.) 95.

[9] *Johnston* v. *The Walker Trs.*, 1897, 24 R. 1061; cf. *Stevenson* v. *Steel Co. of Scotland, Ltd.*, 1896, 23 R. 1079, where an obligation to make a road was held not enforceable by a purchaser of the lands that were intended to be accommodated by the road.

SUBSECTION (2).—*Assignation.*

1017. "Under certain circumstances the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, either by act of the parties or by rules of law operating in certain events."[3]

1018. Contracts involving *delectus personæ* are not assignable. The high-water mark of non-assignability on the ground of this doctrine is represented by the judgment of Lord Tenterden in *Robson & Sharpe* v. *Drummond*.[4] Drummond hired a carriage for five years from Sharpe, who undertook to paint it every year and keep it in repair. Sharpe retired from business and assigned all his rights to his partner, Robson, who intimated to Drummond that he would carry on the contract. Drummond was held entitled to refuse to deal with Robson on account of the element of *delectus personæ* in the contract. The law of partnership in Scotland would have precluded this result in any such case, and in England itself the principle is unlikely to be applied again in such an extreme form.[5] If, however, it can be inferred from the nature or particular terms of a contract of employment that the employee "has been selected with reference to his individual skill, competency, or other personal qualification," an assignation of the contract will not be upheld, even though "the person tendered to take the place of the contracting party may be equally well qualified to do the service." So also where goods are bought because they are made by the vendor, or because the purchaser relies specially upon the vendor's judgment of their fitness for his purpose. But where the contract contains an objective standard of quality for the goods, it may be assigned,[6] and there is no *delectus personæ* in a contract which does not require any higher skill than that of ordinary workmen in the trade.[7] A partner in an ordinary firm can assign his interest in the assets, but not his share in the partnership so as to make the assignee a partner. A lease of rural subjects for an ordinary duration or a like mineral lease cannot be assigned without the landlord's consent. *Delectus personæ* is likewise implied in a shooting or fishing lease, and in the lease of a furnished house.[8] Contracts which involve reciprocal obligations, *i.e.* contracts where, on either side, there is not simply an obligation to pay money, are in general held to imply *delectus personæ.*[1]

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[1] *Love* v. *Amalgamated Society of Lithographic Printers of Great Britain and Ireland*, 1912 S.C. 1078.

[2] *Hislop* v. *MacRitchie's Trs.*, *supra.*

[3] Anson, Law of Contract, p. 274.

[4] 1831, 2 B. & A. 303.

[5] See the judgment of Cockburn C.J. in *The British Waggon Co. and The Parkgate Waggon Co.* v. *Lea & Co.*, 1880, 5 Q.B.D. 149, at p. 153; *Phillips* v. *Alhambra Palace Co.*, [1901] 1 K.B. 59.

[6] *Cole* v. *Handasyde & Co.*, 1910 S.C. 68, per Dunedin L.P. at pp. 73 *sqq.*

[7] *Asphaltic Limestone Concrete Co., Ltd.* v. *Glasgow Corporation*, 1907 S.C. 463.

[8] Ersk., Prin. ii. 6, 13.

1019. But a right which is assignable may arise out of an unassignable contract. "The simplest case would be that of a money claim, pure and simple, which has accrued. Even in such a claim the assignee, while of course entitled to sue in his own name, is liable to all the answers which could have been made to his cedent." [2] And the debtor in such a case is discharged if he pays to his original creditor before receiving notice of the assignation. If in any case the debtor's burden is increased [3] or his resources diminished,[4] the Court will not uphold the assignation. See ASSIGNATION; DELECTUS PERSONÆ.

SECTION 11.—SPECIFIC PERFORMANCE.

1020. In England specific performance was a remedy which could only be obtained in the Court of Chancery as administering equity. The circumstances in which it would be decreed were explained by Lord Chancellor Selborne in *Wilson* v. *Northampton and Banbury Junction Rly. Co.*[5] "The Court gives specific performance only when it can by that means do more perfect and complete justice." And in *Ryan* v. *Mutual Tontine Westminster Chambers Association,*[6] Lord Justice Kay laid down: "The jurisdiction to compel specific performance has always been treated as discretionary and confined within well-known rules." In Scotland contracts *ad factum præstandum* may be specifically enforced when the act can be performed by the defender, or, failing him by another, and the action, if it is not desired or is incompetent to enforce specific performance by imprisonment, may be laid alternatively for performance or for damages.[7] And if an obligation, *e.g.* to build, had become prestable during the tenure of a vassal who has parted with the feu, it is competent in the one action to sue the succeeding vassal for specific performance, and, failing implement, to sue him and his defaulting predecessors jointly and severally for damages.[8] A decree *ad factum præstandum* is competent in implement of a "contract for the sale of a specific thing [9] or estate; [10] of an obligation to build houses of a particular class; [11] to rebuild premises destroyed by fire; [12] to place a tenant in possession of subjects let; [13] to execute or concur in executing a formal and probative deed embodying a fair agreement,"[1] and to pay the balance of instalments for the remaining part of a course of tuition.[2] Specific performance may be refused of an obligation under an ancient contract where the obligee has ceased to have any interest to exact it. But where there has been no change of circumstances it is not a relevant defence to tender an equivalent or superior prestation.[3] But a contractor is disentitled to sue on the contract either for specific performance or for damages if he himself is in breach of his own obligations.[4]

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[1] *Grierson, Oldham & Co., Ltd.* v. *Forbes, Maxwell & Co., Ltd.*, 1895, 22 R. 812; *International Fibre Syndicate* v. *Dawson*, 1900, 2 F. 636; affd. 1901, 3 F. (H.L.) 32.

[2] *Ibid.*, 3 F. (H.L.), per Lord Robertson at p. 33.

[3] *Tolhurst* v. *Associated Portland Cement Manufacturers*, [1903] A.C. 414, per Lord Lindley at p. 423.

[4] *Kemp* v. *Baerselman*, [1906] 2 K.B. 604; see Pollock on Contract, p. 231 *sqq.*

[5] 1874, L.R. 9 Ch. at p. 284.

[6] [1893] 1 Ch. 116, at p. 126. For the rules see Anson, Law of Contract, p. 391 *sqq.*

[7] Bell, Prin. s. 29.

[8] *Rankine* v. *Logie Den Land Co.*, 1902, 4 F. 1074.

[9] *Henry* v. *Morrison*, 1881, 8 R. 692.

[10] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 1.

[11] *Middleton* v. *Leslie*, 1892, 19 R. 801.

[12] *Marshall* v. *Callander Hydropathic Co.*, 1897, 24 R. 712.

[13] *Seaforth Trs.* v. *Macaulay*, 1844, 7 D. 180.

SECTION 12.—REPUDIATION, RESCISSION, AND FRUSTRATION.

1021. Repudiation of the contract is a unilateral act; rescission is bilateral; and frustration is an event. Repudiation is a revolt by one of the contracting parties from the contract and may be made by a definite refusal to perform his obligation either before or at the due date of performance; by a voluntary act which precludes his power of performance; or by the breach of some material stipulation which goes to the root of the contract.[5] Repudiation is in law a wrongful act, although the term is sometimes loosely applied to the right which by law becomes vested in the other party to the contract whenever one of these three acts is committed. That right is usually described as rescission, but, to speak strictly, all that the non-defaulting contractor rescinds is his own obligation under the contract; he holds the defaulter to the contract but takes the value out of him in damages. But rescission, as distinct from repudiation, involves (apart from the action of a Court of law) the operation of two wills, either simultaneously in concert, or consecutively, beginning with a breach on the one part.

1022. Frustration, on the other hand, happens without the intervention of either contracting will; it is a supervening impossibility of performance. In the latest authoritative decision on this branch of the law, Lord Sumner, after distinguishing rescission and frustration, explains their "point of contact." "Though a party may exercise his right to treat the contract as at an end, as regards obligations *de futuro*, it remains alive for the purpose of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence, remain, and the contract remains too for the purpose of giving effect to them."[6] This statement of the law of England, in a case decided by the Privy Council, is not in accordance with the law of Scotland. In *The Cantiere San Rocco* v. *The Clyde Shipbuilding*

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[1] *Erskine* v. *Glendinning*, 1871, 9 M. 656; Gloag on Contract, p. 772 *sqq.*

[2] *International Correspondence Schools, Ltd.* v. *Irving*, 1915 S.C. 28.

[3] *Waddell* v. *Campbell*, 1898, 25 R. 456.

[4] *Johnston* v. *Robertson*, 1861, 23 D. 646, per L. J.-C. Inglis at p. 656; *Turnbull* v. *M'Lean & Co.*, 1874, 1 R. 730, per L. J.-C. Moncreiff at p. 738; *Graham & Co.* v. *United Turkey Red Co.*, 1922 S.C. 533.

[5] *Forslind* v. *Bechely-Crundall*, 1922 S.C. (H.L.) 173.

[6] *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. 497, per Lord Sumner at p. 510.

and Engineering Company, Ltd.,[1] it was decided that the defenders were liable in an action of repetition for the amount of an instalment of the price of engines paid by an Austrian firm on signature of the contract which was frustrated by the outbreak of war. In the event that had occurred the pursuers had a remedy corresponding to the Roman *condictio causa data causa non secuta*, the doctrine of which was an integral part of the law of Scotland.

1023. It is regrettable, both for the sake of the uniformity of British relations in commerce with foreigners and for the interests of legal science, that there should be such a difference between the Scots and the English law of frustration, as is established in the case of *Chandler* v. *Webster*.[2] In the case of *The Cantiere San Rocco* Viscount Finlay said: "The Scottish doctrine of *restitutio* ascertains more accurately the rights of the parties respectively: and the results of the English view might be startling if the whole contract price had been paid in advance."[3] The divergence in the two systems may perhaps be traced to a difference in conception of the doctrine, resulting from the mode in which it arrived at recognition in England. Lord Sumner has characterised the doctrine as "a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."[4] It is, however, noteworthy that the case of *Geipel* v. *Smith*,[5] which appears now to be regarded in England as a typical illustration of the doctrine of frustration,[6] was in fact decided on a construction of the actual terms of the charter-party containing the contract, the Court finding it unnecessary to consider the proposition based on continental codes—"that in the absence of a stipulation as to unforeseen circumstances, we should imply such a term."[7] But it seems unfortunate that historical conditions of the emergence of a doctrine in a system with an original cleavage between law and equity should be allowed to qualify its proper theory when social development has annulled the separation of equity and law, and secured the dominance of equity when their separate rules are at variance.[8]

1024. The most satisfactory explanation of the legal theory on which the doctrine of frustration rests is perhaps that of Lord Watson in *Dahl* v. *Nelson, Donkin & Co.*:[9] "I have always understood that when the parties to a mercantile contract, such as that of affreightment, have not expressed their intentions in a particular event, but have left them to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to the mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charter-party which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence." Viewed from one angle, this statement by Lord Watson might be considered an elaboration of Lord Sumner's "device," but it is conceived that for the philosophy of law its proper significance is to be found in the implied negation of the theory of absoluteness in contract. That is merely a convenient abstraction which is legitimately used to indicate the absence of compassion for a contractor who has made a very lop-sided but binding bargain; but it is improperly used in the theory of frustration, for it ignores the presence in all contracts of the rational will of the state, which alone gives cohesion to the *vinculum*—it truly creates the *vinculum*—that binds two *personæ* within the state in contract. When the event of frustration takes place the state withdraws its cohering power; it does *ex post facto* what it does independently of events, or *ab ante*, in refusing to recognise validity in agreements which from the point of view of the life of the state have some intrinsic defect.

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[1] 1923 S.C. (H.L.) 105.

[2] [1904] 1 K.B. 493.

[3] 1923 S.C. (H.L.) at p. 115.

[4] *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. at p. 510.

[5] 1872, L.R. 7 Q.B. 404.

[6] Anson, Law of Contract, 16th ed., 375.

[7] Per Cockburn (C.J.) at p. 410.

[8] Judicature Act, 1873 (36 & 37 Vict. c. 66). It is difficult on the "device" theory to understand the requirement—"evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract" (Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co.*, [1926] A.C. at p. 507)—and to reconcile that requirement with the application of the doctrine of frustration to a time charter, at least if it has been partly executed. In *Bank Line* v. *Arthur Capel & Co.*, [1919] A.C. 435, the ship let under a time charter had not been delivered on hire when it was requisitioned by the Government.

[9] 1881, 6 App. Cas. 38, at p. 59.

1025. In the law of Scotland there are four forms of frustration, according to the effect of altered circumstances on (1) the parties to the contract; (2) the specific thing contracted about; (3) the legality of the obligation; and (4) the general system of relations in which performance was contracted for. A contract is abrogated—

(i) Where performance of a contract for personal services is rendered impossible by the death or incapacitating illness of the obligor.[1] But if impossibility through death is caused by the wilful act of the contractor, *e.g.* suicide, the contract is not frustrated in the legal sense; the obligor can vindicate his right to damages against the estate of the defaulter. Similarly, a servant's incapacity to perform his obligation must not be due to fault or gross negligence.[2]

(ii) Where performance becomes impossible through the destruction of a specific thing essential to the performance of the contract.[3]

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[1] *Stubbs* v. *Holywell Rly. Co.*, 1867, L.R. 2 Ex. 311, 314; *Robinson* v. *Davison*, 1871, L.R. 6 Ex. 269.

[2] *M'Ewan* v. *Malcolm*, 1867, 5 S.L.R. 62.

[3] *Taylor* v. *Caldwell*, 1863, 3 B. & S. 826; *Appleby* v. *Myers*, 1867. L.R. 2 C.P. 651; *Shipton and Harrison's Arbitration, In re*, [1915] 3 K.B. 679.

(iii) Where performance becomes impossible through a change of law.[1] If the state withdraws the subject-matter from the scope of private obligation, *eo ipso* it snaps the vinculum *quoad hoc* between the parties. But a contractor takes the risk of his burden being increased in measure by subsequent legislation.[2]

(iv) Where through supervening circumstances performance becomes impossible within the time or in the manner contemplated by the parties.[3] If the terms used by Lord Sumner of "common object" may be applied to the case of frustration, it must be in the sense of interchange of values. But impossibility does not supervene by a mere alteration in the proportion of values to be interchanged. The law takes no cognisance of one-sided commercial impossibility.[4]

SECTION 13.—PROPER [5] LAW OF THE CONTRACT.

1026. In the case of *In re Missouri Steamship Co.*,[6] it was decided that when a contract is made in one country to be performed wholly or partially in another, *prima facie* the contract is to be construed and enforced according to the *lex loci contractus*; but the Court will look at all the circumstances to ascertain by the law of which country the parties intended the contract to be governed, and will enforce the contract accordingly, unless it should contain stipulations contrary to morality or expressly forbidden by law. Thus "contracts relating to immoveables are governed by their proper law as contracts, so far as the *lex situs* of the immoveables does not prevent their being carried into execution." [7] For "the general principle of the common law is that the laws of the place where immoveable property is situate exclusively govern, in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them." [8] The interpretation of a contract, however, unless otherwise provided, is determined by the proper law of the contract. With regard to moveables, Westlake is probably well-founded in saying [9] that the intrinsic validity and effects of a contract depend "on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such."[1]

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[1] *Baily* v. *De Crespigny*, 1869, L.R. 4 Q.B. 180; *Caledonian Insurance Co.* v. *Matheson's Trs.*, 1901, 3 F. 865.

[2] *Summerlee Steel Co.* v. *Caledonian Rly. Co.*, 1909 S.C. 536; cf. *Holliday* v. *Scott*, 1830, 8 S. 831.

[3] *Jackson* v. *Union Marine Insurance Co.*, 1874, L.R. 10 C.P. 148; *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum, etc. Co.*, [1906] 2 A.C. 397, per Lord Loreburn at p. 404.

[4] *Hong Kong and Whampoa Dock Co.* v. *Netherton Shipping Co.*, 1909 S.C. 34.

[5] See Dicey, Conflict of Laws, Rule 143.

[6] 1889, 42 Ch. D. 321, followed and applied in *Jones* v. *Oceanic Steam Navigation Co.*, [1924] 2 K.B. 730; see also *Jacobs* v. *Crédit Lyonnais*, 1884, 12 Q.B.D. 589.

[7] Westlake Private International Law, s. 216, cited with approval in *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 2 Ch. at p. 514.

[8] Story, s. 424.

[9] Westlake, Private International Law, s. 212.

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[1] *Ralli Bros.* v. *Compania Naviera Sota y Aznar*, [1920] 1 K.B. 614; affd. [1920] 2 K.B. 287.

CONTRACTOR.

See NEGLIGENCE.

CONTRIBUTION.

See AVERAGE; CAUTIONARY OBLIGATIONS; RELIEF.

CONTRIBUTORY.

See COMPANY; LIQUIDATION.

CONTRIBUTORY NEGLIGENCE.

See COLLISION; NEGLIGENCE.

CONTUMACY.

See CONTEMPT OF COURT.

CONVENTION OF BURGHS.

See BURGHS.

CONVENTIONAL OBLIGATION.

See CONTRACT; OBLIGATION.

CONVERSION.

See HERITABLE AND MOVEABLE.

CONVEYANCING.

See DEEDS, EXECUTION OF; ABSOLUTE DISPOSITION; ASSIGNATION; BOND; CHARTER (FEUDAL); COMPLETION OF TITLE; DISPOSITION; REGISTRATION.

CONVICT.

CONVICTION.

See CRIME.

CONVOY.

See INTERNATIONAL LAW; INSURANCE (MARINE).

CO-OBLIGANT.

See OBLIGATION.

COPIES AND EXTRACTS.

See EVIDENCE; EXTRACT; REGISTRATION OF BIRTHS.

COPYRIGHT.

TABLE OF CONTENTS.

PAGE
- Introductory 464
  - Historical Sketch 464
  - Nature and Definition of Copyright 466
  - Subjects of Copyright 467
- Unpublished Works 467
  - Generally 467
  - Letters 469
  - Lectures 470
- Publication 470
- Literary Copyright 472
  - General Requisites 472
  - Fraudulent Works 474
  - Titles and Names 474
  - Maps, Charts, and Plans 475
  - Immoral, Blasphemous, or Libellous Works 475
  - Newspapers and other Collective Works 476
  - Crown Copyright 477
  - University Copyright 479
- Dramatic and Musical Copyright 479
  - In General 479
  - Cinematograph Productions 481
- Artistic Copyright 482
  - Definitions 482
  - Artistic Works generally 483
  - Book Illustrations 483
  - Architects' Works 484
  - Designs 484
- First Owner of Copyright 485
- Duration of Copyright 489
  - General Period 489
  - Exceptions 489
  - Right to Reproduce on Payment of Royalty 490
  - Compulsory Licences 492
- Transmission of Copyright 492
  - Generally 492
  - Assignation 492
  - Licences 494
  - Limitation of Assignability 495
- Infringement of Copyright 496
  - Generally 496

PAGE
Infringement of Copyright (*contd.*)—

  - Literary Copyright 498
    - What amounts to Infringement 498
    - Exceptions to Author's Monopoly 499
    - Public Performance 500
    - Colourable Imitations 501
  - Dramatic and Musical Copyright 501
    - Reproduction in Material Form 501
    - Performance in Public 502
    - Liability of Proprietor, Lessee, or Occupier of Place of Entertainment 503
  - Artistic Copyright 504
- Remedies for Infringement 505
  - Civil Remedies 505
  - Summary Remedies 507
- Importation of Copies 510
- Joint Works 511
  - Generally 511
  - Duration of Copyright 512
- Works in Existence before 1911 Act 513
- Mechanical Contrivances 516
  - Control of Mechanical Reproduction 516
  - Reproduction on Payment of Royalties 517
  - Foreign Works 521
  - Copyright in Mechanical Contrivances 521
- Colonial Copyright 522
- International Copyright—The Copyright Union 524
  - Introductory 524
  - Authors Protected 525
  - Works Protected 526
  - Duration of Copyright 527
  - Performing Rights 528
  - Mechanical Reproduction 528
  - Cinematographs 529
  - Enforcement of Protection 529
  - Protection under British Copyright Act, 1911 530
- Copyright with United States of America 531

SECTION 1.—INTRODUCTORY.

SUBSECTION (1).—*Historical Sketch.*

1027. In the Roman law there is no trace of the right called copyright. That law concerned itself solely with the property in the parchment or tablet upon which anything was written or printed.[1] It was not until printing and engraving had been invented that questions of copyright could be expected to arise. For more than two centuries after the invention of printing the grant of the right to print books was considered a prerogative of the Crown and took the form of printers' licences. Occasionally the Estates of Parliament interposed their authority, as in the Act 1540, c. 127.[2] In England the Crown exercised a similar power through the Star Chamber. After the abolition of the Star Chamber in 1640, the publication of unlicensed books was prohibited, first by Ordinances of Parliament, and then by the Licensing Act of 1662.[3] It was not, however, until 1709 that permanent statutory protection was given to an author's copyright. In that year the Copyright Act [4] was passed, which applied both to England and Scotland. The Act gave copyright to an author and his assignees for a term of fourteen years from the date of the first publication, with another fourteen years should the author be alive at the end of the first term. In 1814 [5] the period of endurance of copyright was extended to twenty-eight years from the date of the first publication, and, if the author should then be alive, for the residue of his life. Both this Act and the statute of Anne were repealed by the Copyright Act, 1842,[6] which extended the period of protection to the life of the author and seven years after his death, or to forty-two years, whichever period should be the longer. The Act of 1842 regulated literary copyright until the coming into force of the Copyright Act, 1911,[7] which amends and consolidates the whole law of copyright.

1028. Dramatic and musical compositions were subject to the same protection as literary works under the Copyright Acts. The performing rights, however, were not protected until the passing of the Dramatic Copyright Act, 1833.[8] That Act applied only to dramatic pieces, but s. 20 of the Copyright Act, 1842, granted protection to performing rights in both musical and dramatic pieces for the same period as that provided in the case of literary works. Owing to numerous prosecutions of innocent infringers of performing rights in musical works, the Copyright (Musical Compositions) Acts of 1882 and 1888 [9] were passed requiring the owner of the copyright in any musical composition, if he wished to retain the exclusive right of public performance, to print a notice reserving the right on the title-page of every published copy of the work. The Musical (Summary Proceedings) Copyright Act, 1902,[10] and the Musical Copyright Act, 1906,[11] provided summary procedure for dealing with hawkers or sellers and printers of pirated music. These two Acts are still in force, but the others relating to dramatic and musical compositions have been repealed by the Act of 1911.

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[1] Inst. ii. 1, 33 and 34.

[2] Repealed, 6 Edw. VII. c. 38.

[3] 13 & 14 Car. II. c. 33.

[4] 8 Anne c. 19.

[5] 54 Geo. III. c. 156, s. 4.

[6] 5 & 6 Vict. c. 45.

[7] 1 & 2 Geo. V. c. 46.

[8] 3 & 4 William IV. c. 15.

[9] 45 & 46 Vict. c. 40; 51 & 52 Vict. c. 17.

[10] 2 Edw. VII. c. 15.

[11] 6 Edw. VII. c. 36.

1029. As regards the Fine Arts, statutory protection was first granted to engravings. By the Engraving Copyright Act, 1734,[1] copyright for a period of fourteen years was conferred on the designer of the engraving. The Engraving Copyright Act, 1767,[2] gave protection to the engraver also, and extended the term of protection for both to twenty-eight years from the date of publication. Further provisions with regard to copyright in engravings were made by the Prints Copyright Act, 1777,[3] which aimed against piracy, and by s. 14 of the International Copyright Act, 1852,[4] which extended the provisions of the Engraving Acts to prints taken by lithograph or other mechanical process. These four Acts are all superseded and repealed by the Copyright Act, 1911.

1030. Copyright in Sculpture was first introduced by 38 Geo. III. c. 71. This Act was superseded by the Sculpture Copyright Act, 1814,[5] and was repealed by the Statute Law Revision Act, 1861.[6] Under the Act of 1814, which is now repealed by the Copyright Act, 1911, protection was conferred on the sculptor for fourteen years from first publication, with a further term of fourteen years if he was then living and had not divested himself of the copyright.

1031. Paintings, drawings, and photographs, apart from the rights conferred by the Engraving Acts, were for the first time protected by the Fine Arts Copyright Act, 1862.[7] The Act granted copyright during the author's lifetime and for seven years after his death, but made registration necessary in order to entitle the proprietor of the copyright to the benefit of the Act, no action being maintainable in respect of anything done before registration. Where a work was executed on commission, the copyright was the property of the person on whose behalf it was executed, but in the case of an ordinary sale the copyright was lost unless the artist expressly reserved it to himself in writing signed by the vendee, or granted it in writing to the vendee.[8] The Fine Arts Copyright Act, 1862, was repealed, with the exception of one section, by the Copyright Act, 1911.

SUBSECTION (2).—*Nature and Definition of Copyright.*

1032. The word copyright is used to comprehend two different rights, viz. (1) the right of property which an author has in an unpublished production; (2) the exclusive privilege of multiplying copies of the work. It is in the latter sense that the word is generally used; but it has come to include also the exclusive privilege of performing a work in public. In the Copyright Act, 1911,[9] copyright is now defined as follows : "For the purpose of this Act 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public ; if the work is unpublished, to publish the work or any substantial part thereof."

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[1] 8 Geo. II. c. 13.
[2] 7 Geo. III. c. 38.
[3] 17 Geo. III. c. 57.
[4] 15 & 16 Vict. c. 12.
[5] 54 Geo. III. c. 56.
[6] 24 & 25 Vict. c. 101.
[7] 25 & 26 Vict. c. 68.
[8] Copinger, 6th ed., pp. 13, 19.
[9] Sec. 1 (2).

1033. It was formerly a matter of controversy whether copyright existed at common law or was merely the creation of statute. In England the weight of legal opinion favoured a common law right in perpetuity.[1] In *Donaldson's* case,[1] although the existence of the common law right was affirmed, the majority of the judges held that by the wording of the Statute of Anne,[2] conferring copyright for a term of years "and no longer," the right became merged in the statutory right upon publication. In Scotland the common law right was emphatically denied.[3] In the case of *Hinton* [3] the common law right was affirmed by only one judge—Lord Monboddo—and denied by eleven. As regards both countries the right is now purely statutory. Sec. 31 of the Copyright Act, 1911, provides that "no person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force."

SUBSECTION (3).—*Subjects of Copyright.*

1034. Copyright subsists in every original literary, dramatic, musical, and artistic work, (*a*) in the case of a published work, if the work was first published within any of the British dominions to which the Copyright Act, 1911, extends; and (*b*) in the case of an unpublished work, if the author was at the date of making the work a British subject or resident within any of such dominions.[4]

SECTION 2.—UNPUBLISHED WORKS.

SUBSECTION (1).—*Generally.*

1035. Prior to the Copyright Act, 1911, the statutes relating to copyright applied only to works which had been published. Unpublished works were, however, protected by the common law. In Scotland an author had an absolute right of property in, and the uncontrolled disposal of, his unpublished writings.[5] The Courts also exercised the right to restrain a publication where injury to reputation or even private feelings was involved.[6] In England the right of an author to an injunction prohibiting the publication of his unpublished works was originally based more on his right of property,[1] but the Courts have also exercised an equitable jurisdiction to restrain publications as a breach of trust or confidence.[2]

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[1] *Millar* v. *Taylor*, 1769, 4 Burr. 2303; *Donaldson* v. *Becket*, 1774, 4 Burr. 2408.

[2] 8 Anne, c. 19.

[3] *Midwinter* v. *Hamilton*, 1748, Mor. 8295; 1751, 1 Pat. 488; *Hinton* v. *Donaldson*, 1773, Mor. 8307.

[4] Copyright Act, 1911, s. 1 (1).

[5] Bell, Com. (M'Laren's ed.), i. 111; *Caird* v. *Sime*, 1885, 13 R. 23, opinion of L. P. Inglis at p. 33.

[6] Bell, Com. (*ibid.*); *Cadell & Davies* v. *Stewart*, 1804, Mor. Literary Property, App. 13.

1036. The Copyright Act, 1911,[3] provides that, saving the right to restrain a breach of trust or confidence, no person is to be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than in accordance with the provisions of the Act or of any other statutory enactment for the time being in force. In place of the protection accorded to unpublished works at common law, the Act confers a statutory protection on them by providing [4] that copyright is to extend to unpublished works if the author was at the date of the making of the work either (*a*) a British subject or (*b*) resident within the parts of the British dominions to which the Act extends.

1037. It follows that a foreigner is not entitled to copyright in his unpublished works if at the date of the making of the works he was not resident in any of the parts of the British dominions to which the Act extends. By Order in Council, however, copyright may be applied (*a*) to works first published in a foreign country to which the Order relates; (*b*) to literary, dramatic, musical, and artistic works the authors whereof were at the time of the making of the works subjects of a foreign country to which the Order relates; and (*c*) in respect of residence in a foreign country to which the Order relates.[5] Where the making of an unpublished work has extended over a considerable period, the conditions of the Act conferring copyright will be complied with if the author was, during any substantial part of the period, a British subject or a resident within the parts of the British dominions to which the Act extends.[6] The author is to be deemed to be a resident within such parts of the dominions if he is domiciled therein.[7] A foreign author who is unable to claim copyright for his unpublished work under any of the above provisions of the Act, might still be entitled to restrain publication of the work if made under circumstances which constituted a breach of trust or confidence.[8]

1038. In the case of manuscripts which are unpublished at an author's death, the Act of 1911 provides that, where the ownership of such manuscripts has been acquired under a testamentary disposition made by the author, such ownership is to be *prima facie* proof of the copyright being with the owner of the manuscript.[9] The provision applies only to manuscripts and not to artistic works. It applies also only to such manuscripts as are the property of the author at the date of his death. In the case of intestacy the manuscript and with it the copyright, if not assigned, will pass to the author's personal representatives.

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[1] Bell, Com. i. 112.

[2] Copinger, 6th ed., pp. 27 *et seq.*; *Prince Albert* v. *Strange*, 1849, 1 Mac. & G. 25; *Duke of Queensberry* v. *Shebbeare*, 1758, 2 Eden 329; *Lamb* v. *Evans*, [1893] 1 Ch. 218; *Gilbert* v. *Star Newspaper Co.*, 1894, 11 T.L.R. 515; *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q.B. 147; *Exchange Telegraph Co.* v. *Central News*, [1897] 2 Ch. 48.

[3] Sec. 31.

[4] Sec. 1 (1).

[5] Act of 1911, s. 29 (1).

[6] *Ibid.*, s. 35 (4).

[7] *Ibid.*, s. 35 (5).

[8] Copinger, 6th ed., p. 27.

[9] Act of 1911, s. 17 (2).

SUBSECTION (2).—*Letters.*

1039. Among unpublished works, letters and lectures fall to be specially noticed. In the case of private letters the property in the actual letter is in the receiver. Under the old law the writer was held entitled to restrain publication where publication would be a breach of confidence or would injure literary reputation, or character, or even private feelings.[1] Thus the publication of Robert Burns's "Letters Addressed to Clarinda" was interdicted on the application of the poet's representatives.[2] The Court proceeded on the ground "that the communication in letters is always made under the implied confidence that they shall not be published without the consent of the writer, and that the representatives of Burns had a sufficient interest, for the vindication of his literary character, to restrain this publication." But in Scotland the remedy of interdict was held to be within the discretion of the Court, and it has been refused where publication was for the information of others as to the facts in a controversy between the parties, and no injury to literary reputation or to character was involved.[3] It would now seem, however, that a letter is to be regarded as an "original literary work" within the meaning of subs. (1) of s. 1 of the Act of 1911,[4] and that the writer would, therefore, have an absolute right to restrain publication on the ground of infringement of copyright. With regard to letters posthumously published, s. 3 of the Copyright Act of 1842, which applied to literary works generally, gave the copyright to the owner of the documents. That section provided that the copyright in every book which should be published after the author's death should be the property of the proprietor of the author's manuscript from which such book should be first published. It was held that the representative of the recipient of certain letters written by Charles Lamb had under this section an inchoate copyright which vested in him or his assigns on publication.[5] Under the Act of 1911 the copyright in letters as well as other manuscripts remains in the author, and passes from him to his personal representatives.[4] An exception to the writer's right to restrain publication occurs where the production of letters is required in a Court of Justice.[6] Governments, also, have a right, on grounds of public policy, to publication or non-publication of letters addressed to public officers.[7]

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[1] Bell, Com. (M'Laren's ed.), i. 111.

[2] *Cadell & Davies and Others* v. *Stewart*, 1804, Mor. Literary Property, App. 13.

[3] *White* v. *Dickson*, 1881, 8 R. 896.

[4] Macgillivray, Copyright Act, 1911, p. 122.

[5] *Macmillan & Co.* v. *Dent*, [1907] 1 Ch. 107.

[6] Bell, Com. (M'Laren's ed.), i. 112; Dickson, Evidence, ss. 1367, 1376.

[7] Copinger, 6th ed., p. 40.

SUBSECTION (3).—*Lectures.*

1040. Lectures were protected prior to the Act of 1911 by the Lecturers' Copyright Act, 1835, now repealed. The earlier Act gave copyright in a lecture, provided that two days before the lecture notice was given in writing to two justices of the peace living within five miles of the place of delivery. But the owner of the copyright was protected only against printing and publishing, and could not prevent the delivery of the lecture by another. The Act, moreover, did not apply to lectures delivered in any university, or public school, or college, or on any public foundation, the protection of these being left to the common law.[1] By the Act of 1911 copyright is conferred on all lectures,[2] which include addresses, speeches, or sermons.[3] It is defined as the sole right to deliver the work or any substantial part thereof in public, and, if the lecture is unpublished, to publish the work or any substantial part thereof.[2] But in order to be entitled to the protection of copyright, a lecture must be expressed in print or writing.[4]

1041. Newspapers may always publish a summary of a lecture delivered in public, or reasonable extracts for the purpose of criticism.[5] They may also publish a verbatim report of a lecture delivered in public,[6] unless reports are prohibited by the notices referred to in s. 2, subs. (1) (v) of the Act. But the right either to report or summarise is confined to newspapers. Lectures delivered in a university or college are not delivered in public and cannot be reported without the consent of the lecturer ; and publication of such lectures otherwise than in a newspaper may be restrained on the ground that there is an implied condition that the persons hearing the lecture shall not print or publish it.[7] A lecture is not deemed to be delivered in public if so delivered without the consent or acquiescence of the author.[8] Delivery includes delivery by means of a mechanical instrument.[9]

SECTION 3.—PUBLICATION.

1042. The question what amounts to publication of a work was of greater importance under the old law than it is under the Act of 1911; for, whereas under the old law the period of protection generally expired at a fixed date reckoned from the date of first publication, under the Act of 1911 copyright in the case of all works exists for fifty years after the author's death. It is still of importance, however, to consider whether there has been publication of a work or not, because in the case of an unpublished work the period of protection may be greater than that which it would have received if it had been published; and the works of a foreigner not resident in the parts of the British dominions to which the Act extends, while entitled to copyright if first published within those dominions, have no protection if unpublished, unless protection is extended to them by Order in Council under s. 29 (1) of the Act.

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[1] *Caird* v. *Sime*, 1885, 13 R. 23, per Lord Pres. Inglis at p. 36.

[2] Act of 1911, s. 1 (2).

[3] *Ibid.*, s. 35 (1).

[4] *University of London Press* v. *University Tutorial Press*, [1916] 2 Ch. 601, per Peterson J. at p. 608.

[5] Act of 1911, s. 2 (1) (i).

[6] *Ibid.*, s. 2 (1) (v).

[7] *Caird* v. *Sime*, 1887, 14 R. (H.L.) 37 ; 12 App. Cas. 326 ; *Nicols* v. *Pitman*, 1884, 26 Ch. D. 374.

[8] Act of 1911, s. 35 (2).

[9] *Ibid.*, s. 35 (1).

1043. Publication means the issue of copies of the work to the public.[1] Contrary to what was the law prior to the Act,[2] a work cannot, therefore, be orally published; nor, it would seem, can it be published by the making of a single copy, or by the presentation of copies to individuals or to a limited class.[3] Publication does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art.[1] Under the law prior to the Act the public delivery of a lecture,[2] or the performance in public of a dramatic or musical work [4] was held to be publication of the work. But the exhibition in public of an artistic work, copying not being permitted, did not constitute publication.[5] An exception to the above definition of publication as the issue of copies of the work to the public is made in the case of sculpture and architectural works of art, which are not to be deemed to be published by the issue of photographs and engravings.[6] Such works are thus distinguished from other artistic works such as drawings and paintings, which would seem ordinarily to be published by means of photographs and engravings.[7] The only way, probably, in which an architect could publish his work would be by issuing drawings or paintings to the public.

1044. A published work is entitled to the protection of the Act only if it was first published within the parts of the British dominions to which the Act extends.[8] A work is to be deemed, however, to be published within such parts of the British dominions notwithstanding that it has been published simultaneously in some other place, unless the publication in the British dominions is colourable [9] and is not intended to satisfy the reasonable requirements of the public.[10] A work is to be deemed to be published simultaneously in two places if the time between the publication in the one place and the publication in the other does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council.[10]

1045. For the purposes of the Act other than those relating to the infringement of copyright, a work is not to be deemed to be published or performed in public, or a lecture to be delivered in public, if published, performed, or delivered in public without the consent or acquiescence of the author, his executors, administrators, or assigns.[1]

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[1] Act of 1911, s. 1 (3).

[2] *Caird* v. *Sime*, 1885, 13 R. 23, per Lord Pres. Inglis at p. 33; *Walter* v. *Lane*, [1900] A.C. 539.

[3] Copinger, 6th ed., pp. 34, 35.

[4] Act of 1842 (5 & 6 Vict. c. 45), s. 20; *Boucicault* v. *Delafield*, 1863, 1 H. & M. 597; *Falcon* v. *Famous Players Film Co.*, [1926] 1 K.B. 393; (C.A.), [1926] 2 K.B. 474.

[5] *Turner* v. *Robinson*, 1860, 10 Ir. Ch. 120 and 510.

[6] Act of 1911, s. 1 (3).

[7] Copinger, 6th ed., p. 34.

[8] Act of 1911, s. 1 (1).

[9] *Francis, Day & Hunter* v. *Feldman & Co.*, [1914] 2 Ch. 728.

[10] Act of 1911, s. 35 (3).

SECTION 4.—LITERARY COPYRIGHT.

SUBSECTION (1).—*General Requisites.*

1046. Copyright subsists throughout the parts of the British dominions to which the Copyright Act, 1911, extends in all original literary works first published within such parts of the British dominions.[2] A literary work is not defined in the Act, but it is stated to include "maps, charts, plans, tables, and compilations." [3]

1047. In order that a work may be the subject of copyright, the Act requires that it shall be an original work. The originality required relates not to ideas, which are not the subject of copyright protection, but to the words in which the ideas are expressed.[4] The work must originate from the author and not be a mere copy of the work of another. Thus, a reprint or a new edition of a work is not entitled to copyright, but it may be so altered as to constitute in reality a new work.[5] It is immaterial whether the new edition is produced by enlarging or condensing, or by re-writing or merely correcting or otherwise altering the original work. But the alterations must be so substantial as practically to make a new book.[6] Abridgements were under the old law entitled to protection as original works if they were not mere reductions in the size of the work through retaining some passages and leaving out others, but were true abridgements in preserving the entire substance of the work in language different from the original.[7] It is doubtful, however, if abridgements would now be permitted.[8] Translations are also original works. They are entitled to protection [9] as against other translations into the same language. But this is without prejudice to the author of the work, whose copyright includes the sole right to make a translation.[10] In law reports copyright subsists in the rubrics or head-notes,[11] but not in the opinions of the judges. A person who takes shorthand notes of a speech delivered in public is entitled to copyright in the verbatim report as the author of the report.[12] Legal styles, although drawn according to statutory directions, are entitled to protection, but not if they are mere reprints of forms contained in statutes.[13]

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[1] Act of 1911, s. 35 (2).

[2] *Ibid.*, s. 1 (1).

[3] *Ibid.*, s. 35 (1).

[4] *University of London Press, Ltd.* v. *University Tutorial Press, Ltd.*, [1916] 2 Ch. 601, per Peterson J. at p. 608.

[5] *Black* v. *Murray & Son*, 1870, 9 M. 341.

[6] *Ibid.*, per Lord Kinloch at p. 355; *Hedderwick* v. *Griffin*, 1841, 3 D. 383; *Thomas* v. *Turner*, 1886, 33 Ch. D. 292; *Blacklock* v. *Pearson*, [1915] 2 Ch. 376.

[7] Bell, Com. (M'Laren's ed.), i. 118; Copinger, 6th ed., pp. 53 and 134; *Gyles* v. *Wilcox*, 1740, 2 Atk. 143; *Macmillan* v. *Cooper*, 1924, 40 T.L.R. 186.

[8] See *infra*, para. 1110.

[9] *Byrne* v. *Statist Co.*, [1914] 1 K.B. 622.

[10] Act of 1911, s. 1 (2) (*a*).

[11] *Sweet* v. *Benning*, 1855, 16 C.B. 459.

[12] *Walter* v. *Lane*, [1900] A.C. 539.

[13] *Alexander* v. *Mackenzie*, 1847, 9 D. 748.

1048. Very little independent work may be sufficient to gain the protection of copyright. The mere collection and compilation of information from sources readily accessible to all will not entitle the compiler to copyright, but protection will be granted where there has been difficulty in gaining access to the originals, or skill is exercised in making or arranging the selection.[1] Thus copyright has been refused to specifications of patents copied at the Patent Office, these being accessible to the public and no research being required.[2] In the following cases there has been held to be copyright: in a compilation of old letters translated into modern English and arranged in the order of date in which the compiler considered they had been written;[3] in selections of poems or prose compositions, and collections of proverbs, quotations, hymns, etc.;[4] in mathematical tables calculated by a person himself, although the same tables have been previously published by another;[5] in a list of imports and exports of goods called the "Clyde Bill of Entry";[6] in a list of foxhounds and hunting days;[7] in a list of brood mares with their sires and a list of stallions at the stud;[8] in the headings and arrangement of a series of advertisements;[9] in a trade catalogue;[10] in a trade advertisement consisting of a sheet of illustrations;[11] in school books for children;[12] in a gazetteer;[13] in a road book;[14] in a directory;[15] in information as to circular tours attached to a railway time-table, but not in the railway time-table itself;[16] in an alphabetical list of railway stations contained in Bradshaw's Railway Guide.[17]

1049. The work, besides being original, must be a literary work. The word "literary" is used, not in regard to style or finish, but simply to indicate written or printed matter. Thus, there has been held to be copyright in mere compilation and arrangement, as a Court calendar or an almanac, and in mere results of inquiry, as in a road book or guide book;[18] in newspaper telegrams;[19] in a telegraphic code;[20] and in a system of shorthand.[21] But there must be independent and original work of some sort on the part of the author. Thus, the printed face of a barometer has been held not to come within the definition of literary work;[1] nor a piece of cardboard cut so that when held up to the light it cast a shadow resembling the well-known picture "Ecce Homo," accompanied by a slip of paper with a verse of non-copyright poetry;[2] nor a cardboard pattern sleeve for ladies' dresses with descriptive words thereon for adapting it to sleeves of any size;[3] nor a cricket scoring sheet;[4] nor an album for holding photographs;[5] nor a card containing spaces and directions for filing particulars under the National Health Insurance Act.[6]

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[1] Copinger, 6th ed., p. 50.

[2] *Wyatt* v. *Barnard*, 1814, 3 V. & B. 77.

[3] Copinger, 6th ed., p. 47.

[4] *Macmillan* v. *Suresh*, 1890, 17 Indian L.R. (Calcutta) 951.

[5] *Bailey* v. *Taylor*, 1829, 1 Russ. & My. 73.

[6] *Maclean* v. *Moody*, 1858, 20 D. 1154.

[7] *Cox* v. *Land and Water Journal Co.*, 1869, L.R. 9 Eq. 324.

[8] *Weatherby* v. *International Horse Agency*, [1910] 2 Ch. 297.

[9] *Lamb* v. *Evans*, [1892] 3 Ch. 462.

[10] *Hotten* v. *Arthur*, 1863, 1 H. & M. 603; *Maple* v. *The Army and Navy Stores*, 1882, 21 Ch. D. 369; *Harpers, Ltd.* v. *Barry, Henry & Co., Ltd.*, 1892, 20 R. 133; cf. *White* v. *Briggs*, 1890, 18 R. 223.

[11] *Davis* v. *Benjamin*, [1906] 2 Ch. 491.

[12] *Lennie* v. *Pillans*, 1843, 5 D. 416.

[13] *Lewis* v. *Fullerton*, 1839, 2 Beav. 6.

[14] *Taylor and Skinner* v. *Bayne and Wilsons*, 1776, Mor. 8308.

[15] *Kelly* v. *Hooper*, 1840, 4 Jur. 2; *Kelly* v. *Morris*, 1866, L.R. 1 Eq. 697; *Morris* v. *Wright*, 1870, L.R. 2 Ch. 279; *Morris* v. *Ashbee*, 1868, L.R. 7 Eq. 34; *Kelly's Directories* v. *Gavin and Lloyds*, [1902] 1 Ch. 631.

[16] *Leslie* v. *Young & Sons*, 1893, 20 R. 1077; 21 R. (H.L.) 57; [1894] A.C. 335.

[17] *Blacklock & Co., Ltd.* v. *Pearson, Ltd.*, [1915] 2 Ch. 376.

[18] *McLean* v. *Moody*, 1858, 20 D. 1154, at p. 1163.

[19] *Exchange Telegraph Co.* v. *Central News*, [1897] 2 Ch. 48.

[20] *Anderson* v. *Lieber Code Co.*, [1917] 2 K.B. 469.

[21] *Pitman* v. *Hine*, 1884, 1 T.L.R. 39.

1050. There may be copyright in part of a work without right to the whole.[7] There may also be copyright in the notes on a work which is itself beyond the term of copyright.[8]

SUBSECTION (2).—*Fraudulent Works.*

1051. There is no copyright in a work which is intended to defraud the public[9] by falsely representing, *e.g.*, that it is the work, or a translation of the work, of an author who had a real existence.[10] But there is no fraud in publishing books of amusement or instruction as translations which are in fact original works, or in publishing them under an assumed name, for in such cases there is no intent to deceive the purchaser and make gain from him by the false representation.[11] The publisher of a work will be restrained from advertising it in such a way as is calculated to lead the public into believing that it is another work;[12] but not from representing that an old work of an author is a new work of the same author.[13]

SUBSECTION (3).—*Titles and Names.*

1052. As a general rule there cannot be copyright in the title or name of a book, newspaper, or periodical.[14] But it is thought that there might be if there were something decidedly original in the arrangement of words which form the title. Titles, however, are generally protected on the ground, not of copyright, but that the copier is fraudulently representing his work as that of the prior user of the title. The protection here is of a similar nature to that accorded to a trade name.[1] The publication for which protection is claimed must have been in the market long enough to acquire a public reputation,[2] and the title must be such as is calculated to deceive the public.[3] On similar grounds a writer who has written for a newspaper under a *nom-de-plume* may, on terminating his connection with the newspaper, restrain the proprietor from using the *nom-de-plume*.[4]

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[1] *Davis* v. *Comitti*, 1885, 52 L.T. 539.

[2] *Cable* v. *Mark*, 1882, 52 L.J. Ch. 107.

[3] *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420; *Boosey* v. *Wright*, [1900] 1 Ch. 122.

[4] *Page* v. *Wisden*, 1869, 20 L.T. 435.

[5] *Schove* v. *Schminke*, 1886, 33 Ch. D. 546.

[6] *Libraco, Ltd.* v. *Shaw Walker*, 1913, 30 T.L.R. 22.

[7] Bell, Com. (M'Laren's ed.), i. 118; *Lamb* v. *Evans*, [1893] 1 Ch. 218.

[8] Bell, Com., *ibid.*; *Black* v. *Murray*, 1870, 9 M. 341, and cases there; *Moffat and Paige* v. *Gill*, 1902, 18 T.L.R. 547.

[9] *Macfarlane & Co.* v. *The Oak Foundry Co.*, 1883, 10 R. 801, per Lord Pres. Inglis at p. 807; *Slingsby* v. *Bradford Patent Truck and Trolley Co.*, [1906] W.N. 51.

[10] *Wright* v. *Tallis*, 1845, 1 C.B. 893.

[11] *Wright* v. *Tallis*, *supra*, per Tindal C.J. at p. 906.

[12] *Seeley* v. *Fisher*, 1841, 11 Sim. 581.

[13] *Harris & Co.* v. *Ware and Phillips*, Macgillivray's Cop. Cas. (1917–23) 44.

[14] *Maxwell* v. *Hogg*, 1867, L.R. 2 Ch. 307; *Dicks* v. *Yates*, 1881, 18 Ch. D. 76; *Broemel* v. *Mayer*, 1912, 29 T.L.R. 148.

SUBSECTION (4).—*Maps, Charts, and Plans.*

1053. The Act of 1911 includes maps, charts, plans, tables and compilations in the definition of literary works.[5] Prior to the Act a map was a subject of literary copyright under the Copyright Act of 1842, but it might be protected as an engraving, if it were so called, under the Engravings Acts. Under the Act of 1911 the copyright in an engraving made to order for valuable consideration belongs to the person by whom the plate was ordered;[6] but a map being now entitled to protection only as a literary work, the copyright would belong to the person who ordered the plate only where he was the employer of the maker of the plate under a contract of service or apprenticeship.[7]

SUBSECTION (5).—*Immoral, Blasphemous, or Libellous Works.*

1054. The rule is laid down in England that there can be no copyright in an immoral, obscene, irreligious, or libellous work, on the ground that the author is unable to acquire a property in such works and therefore cannot show a right to sell.[8] Protection has been refused to works as being irreligious on the ground that they contradicted scriptural doctrine,[9] but it is now considered permissible to criticise or controvert religious doctrines and beliefs, provided it is not done contumeliously or scoffingly, and in an indecorous manner.[10] According to Bell,[11] the principle that there can be no copyright in an immoral or indecent work is not sanctioned in Scotland. Should the question now arise, however, it would appear that the law would be held to be the same as in England.[1] As regards blasphemy, it consists, according to Hume,[2] in "denial of the being, attributes, or nature of God, or the authority of the Holy Scriptures." But "blasphemy is only committed by the uttering of such things when it is done in a scoffing and railing manner; out of a reproachful disposition in the speaker, and, as it were, with passion against the Almighty, rather than with any purpose of propagating the irreverent opinion."[2] An interesting case regarding the question of copyright in a work alleged to be blasphemous was decided in 1874 in the Sheriff Court of Lanarkshire.[3] A work entitled "The Life of Jesus re-written for young disciples," by a Mr Hopps, a Unitarian minister, was published at 1s. a copy. The defender Long, a Protestant missionary, issued a reprint of Hopps's work, containing, in addition, a preface and notes, and at the end of each chapter a review and refutation of the doctrines advanced by Hopps, and the publication was sold at 6d. a copy. In an application at the instance of Hopps for interdict, the defender pleaded that the work was not entitled to the protection of copyright on the ground it contained blasphemous and heretical doctrines, and was therefore beyond the pale of the law. Sheriff Buntine found that the work was simply an account from the Unitarian point of view of the life of Christ and was entitled to protection.[4]

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[1] *Edinburgh Correspondent Newspaper*, 1882, 1 S. (N.E.) 407 (note); *Constable & Co.* v. *Brewster*, 1824, 3 S. 215; *Metzler* v. *Wood*, 1878, 8 Ch. D. 606; *Bradbury* v. *Beeton*, 1869, 18 W.R. 33.

[2] Bell, Com. (M'Laren's ed.), i. 118; *Licensed Victuallers Newspaper Co.* v. *Bingham*, 1888, 38 Ch.D. 139.

[3] *Hogg* v. *Kirby*, 1803, 8 Vesey 215; *Chappell* v. *Sheard*, 1855, 2 K. & J. 117; *Chappell* v. *Davidson*, 1855, 2 K. & J. 123; *Hall* v. *Barrows*, 1863, 4 De G. J. & S. 150; *Clement* v. *Maddick*, 1859, 1 Giff. 98; *Kelly* v. *Byles*, 1878, 13 Ch. D. 682.

[4] *Landa* v. *Greenberg*, 1908, 24 T.L.R. 441; *Maitland Davidson* v. *The Sphere and Tatler*, Macgillivray's Cop. Cas. (1917–23) 128.

[5] Act of 1911, s. 35 (1).

[6] *Ibid.*, s. 5 (1) proviso (*a*).

[7] *Ibid.*, s. 5 (1), proviso (*b*).

[8] Copinger, 6th ed., p. 59; *Stockdale* v. *Onwhyn*, 1826, 5 B. & C. 173; *Southey* v. *Sherwood*, 1817, 2 Mer. 435; *Lawrence* v. *Smith*, 1822, 1 Jac. 471, and cases at p. 474; *Baschet* v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73; *Glyn* v. *Weston Feature Film Co., Ltd.*, [1916] 1 Ch. 261.

[9] *Lawrence* v. *Smith, supra.*

[10] Story, Equity Jurisprudence, p. 938; Copinger, 6th ed., p. 61; *Rex* v. *Waddington*, 1822, 1 B. & C. 26; *Shore* v. *Wilson*, 1842, 9 Clark & Finnelly, 355.

[11] Bell, Com. (M'Laren's ed.), i. 114.

SUBSECTION (6).—*Newspapers and other Collective Works.*

1055. A collective work, such as a newspaper or encyclopædia, is protected under the Act of 1911 as a compilation, which is included in the definition of a literary work.[5] The Act defines a collective work as meaning (*a*) an encyclopædia, dictionary, year book, or similar work; (*b*) a newspaper, review, magazine, or similar periodical; and (*c*) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated.[5] The copyrights in, and rights of contributors with regard to, contributions to collective works are dealt with under "First Owner of Copyright."[6]

1056. The Act contains no definition of a newspaper. In the Post Office Act, 1908,[7] a newspaper is defined as "any publication consisting wholly or in great part of political or other news or of articles relating thereto or to other current topics with or without advertisements . . . published in numbers at intervals of not more than seven days." This definition, without the limitation as to intervals of publication, might fairly be adopted in the application of the Act.[1] There is no copyright in news as such, but there is copyright in the form of expression in which the news is conveyed.[2] A newspaper is entitled to copyright in the verbatim report of a public speech.[3] There may also be copyright in the headings and arrangement of a sheet of advertisements.[4]

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[1] See *Macfarlane & Co.* v. *The Oak Foundry Co.*, 1883, 10 R. 801, per Lord Pres. Inglis at p. 807.

[2] Hume, Com. i. 568.

[3] *Hopps* v. *Long*, reported Edinburgh Courant, 27th February 1874.

[4] See also *Shore* v. *Wilson*, *supra*; *General Assembly of the Baptist Church* v. *Taylor*, 1841, 3 D. 1030, per Lord Jeffrey at p. 1033.

[5] Sec. 35 (1).

[6] Para. 1079, *infra*.

[7] 8 Edw. VII. c. 48, s. 20.

1057. Under the Act of 1911 newspapers are accorded the following privileges in dealing with the copyright works of others: (1) A newspaper may deal with any work for the purpose of criticism, review, or newspaper summary.[5] The right of newspaper summary of a work is a new right. Only fair dealing, however, is permissible. Probably the best test of fair dealing is to ascertain whether the summary is such that, having regard to the character and circulation of the work summarised and the newspaper respectively, there is any probability of injury being done to the copyright work.[6] (2) A newspaper may publish a verbatim report of a lecture delivered in public,[7] unless reports are prohibited by the notices referred to in s. 2 (1) (v) of the Act; even if reports are so prohibited, a summary of the lecture is permissible. But the lecture must be delivered in a place to which the members of the public are admitted as such. Lectures delivered in a university or college are not delivered in public.[8] (3) A newspaper may publish a full report of an address of a political nature delivered at a public meeting, notwithstanding any prohibition by public notice.[9] Alterations may be made in contributions to a newspaper, in the absence of any contract, express or implied, that no alterations are to be made.[10] Letters and communications sent to a newspaper for publication are the property of the proprietor of the newspaper, and the editor may be restrained from making use of them for his own purposes.[11]

SUBSECTION (7).—*Crown Copyright.*

1058. When the Crown ceased to exercise, through the grant of licences, complete control over the printing-press, it still claimed the exclusive right of printing certain works. In Scotland the Crown, or its licensee, has the sole right of printing the Bible, the Psalm-Book, the Confession of Faith, the Larger and Shorter Catechisms, and the Book of Common Prayer.[12] This applies to the text only. If there be a commentary or notes added, it is open to anyone to print, unless the commentary or notes are so short as to be merely a pretext for evading the exclusive right.[1] The grounds upon which this exclusive privilege of the Crown is based are not very certain, and the reasons given by the judges, both in Scotland and in the cases in England declaring a similar right in the Crown, are unsatisfactory, and sometimes contradictory, but the judgment of the House of Lords in the cases quoted must be taken as firmly establishing the right. The exclusive right of printing Acts of Parliament, Edicts, and Royal Proclamations is also vested in the Crown. As in the case of Bibles, the addition of a *bona fide* commentary or notes entitles the author to print the text of a statute.[2]

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[1] Macgillivray's Copyright Act, 1911, p. 36.

[2] *Walter* v. *Steinkopff*, [1892] 3 Ch. 489.

[3] *Walter* v. *Lane*, [1900] A.C. 539.

[4] *Lamb* v. *Evans*, [1892] 3 Ch. 462.

[5] Act of 1911, s. 2 (1) (i).

[6] Macgillivray's Copyright Act, 1911, p. 28.

[7] Act of 1911, s. 2 (1) (v).

[8] *Caird* v. *Sime*, 1887, 14 R. (H.L.) 37; 12 App. Cas. 326; *Nicols* v. *Pitman*, 1884, 26 Ch. D. 374.

[9] Act of 1911, s. 20.

[10] Copinger, 6th ed., p. 201.

[11] *Hogg* v. *Kirby*, 1803, 8 Ves. 215.

[12] *H.M. Printer and Stationer*, 1790, Mor. 8316; *King's Printer*, 1823, 2 S. 275; 1828, 3 W. & S. 268; *King's Printer*, 1826, 4 S. 567; 1828, 3 W. & S. 268.

1059. With regard to such Government publications as Ordnance Maps, blue books, reports, etc., the copyright, prior to the Act of 1911, belonged to the author, unless where it vested in the Crown under the provisions of the Copyright Act, 1842,[3] with regard to collective works, or on the ground that the work was done by a paid servant of the Crown in the course of his employment. The Act of 1911 now provides that without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of the Act, been prepared or published by or under the direction or control of His Majesty or any Government Department, the copyright in the work shall, subject to any arrangement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.[4]

1060. The Treasury does not in practice enforce all its rights in regard to Government publications. By Treasury Minutes dated 31st August 1887 and 28th June 1912, Government publications are divided into seven classes: (1) Reports of Select Committees of the two Houses of Parliament, or of Royal Commissions; (2) Papers required by statute to be laid before Parliament, *e.g.* Orders in Council, Rules made by Government Departments, Accounts, Reports of Government Inspectors; (3) Papers laid before Parliament by Command, *e.g.* Treaties, Diplomatic Correspondence, Reports from Consuls and Secretaries of Legation, Reports of Inquiries into Explosions or Accidents, and other Special Reports made to Government Departments; (4) Acts of Parliament; (5) Official books, *e.g.* King's Regulations for the Army or Navy; (6) Literary or *quasi*-literary works, *e.g.* the Reports of the "Challenger" Expedition, the Rolls Publications, the State Trials, the "Board of Trade Journal"; (7) Charts and Ordnance Maps. In the Minute of 28th June 1912 the Treasury declared its intention to enforce strictly copyright in publications falling within the last three classes. In the case of publications falling within the first four classes, the Treasury state that no steps will ordinarily be taken to enforce the rights of the Crown, but that these rights are not to lapse, and may be asserted should exceptional circumstances appear to justify such a course. Acts of Parliament must not, except when published under the authority of the Government, purport on the face of them to be published by authority.

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[1] *H.M. Printer and Stationer*, 1790, Mor. 8316.

[2] *Baskett* v. *Cunningham*, 1762, Black. 370.

[3] 5 & 6 Vict. c. 45, s. 18.

[4] Sec. 18.

SUBSECTION (8).—*University Copyright.*

1061. By the Copyright Act, 1775,[1] the universities of Oxford, Cambridge, St Andrews, Glasgow, Aberdeen, and Edinburgh, and the colleges of Eton, Westminster, and Winchester were granted a perpetual copyright in any book which might be "bequeathed or otherwise given" to any of them. But the right was to subsist only so long as the books continued to be printed at their own printing-presses within the said universities or colleges;[2] and to make the right effectual the book for which it was claimed had to be entered at Stationers' Hall within two months after the bequest or gift had come to the knowledge of the university or college authorities.[3] Power was given to sell the copyright of any such works, but in that case or in the case of a delegation, grant, or lease of the copyright, the privilege was to cease to exist. The Act of 1911 now provides that nothing in the Act is to deprive any of the universities and colleges mentioned in the Copyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright are to be under the Act of 1911 and not under the Act of 1775. The effect of this provision is to preserve all perpetual copyrights subsisting at the date of the commencement of the Act, subject to the same conditions as to printing and sale; but, as the Act of 1775 is repealed, bequests or gifts to the said universities or colleges will carry no perpetual copyright, but only the copyright accorded by the Act.

SECTION 5.—DRAMATIC AND MUSICAL COPYRIGHT.

SUBSECTION (1).—*In General.*

1062. Copyright subsists in every original dramatic and musical work which was first published within the parts of the British dominions to which the Act extends, or which, if unpublished, was, at the date of the making, the work of a British subject or of a person resident within such parts of the British dominions.[4] As public performance of a dramatic or musical work is not now to be deemed to be publication of the work,[5] a first public performance within the British dominions will not confer copyright in a dramatic or musical work which exists only in manuscript, unless the above conditions for the protection of an unpublished work are satisfied.

1063. There are two distinct rights in dramatic and musical pieces; (1) the right of multiplying copies of the written or printed work, and (2) the right of public representation or performance, which has now come to be called play right or performing right. The old law gave performing rights only in respect of any "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment,[6] and in respect of musical compositions;[1] but under the Act of 1911 copyright includes the right to perform in public any work whatsoever. The above two rights are quite distinct and may be vested in different individuals.

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[1] 15 Geo. III. c. 53.
[2] *Ibid.*, s. 3.
[3] *Ibid.*, s. 4.
[4] Act of 1911, s. 1 (1).
[5] *Ibid.*, s. 1 (3); see Publication, *supra*, para. 1043.
[6] Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15), s. 1.

1064. A dramatic work is stated to include "any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character."[2] Under the law prior to the 1911 Act there was no copyright in a dramatic work, unless it was capable of being printed and published. It was therefore held that accessorial matters, such as scenic effects, make-up of actors, or stage "business," taken by themselves and apart from the words and incidents of the piece, were not the subject of copyright, although they might be considered as evidence of intention to plagiarise.[3] "Gag" was also held in the same case not to be within the Copyright Acts,[4] on the ground that the author was generally the actor, and even if the actor and the writer were one and the same person, the "gag" was not a permanent part of the production but varied from time to time. This decision has been followed under the Act of 1911 with regard to scenic effects and stage "business."[5] It is thought that the decision still applies also to "gag," as there must be some certainty in the subject-matter of copyright.[6] The Act of 1911, however, in providing that a dramatic work includes choreographic work or entertainment in dumb show, the acting form of which is fixed in writing "or otherwise," seems to have effected an alteration in the law that a dramatic work, in order to be the subject of copyright, must be capable of being printed and published. The acting form might be fixed by a mere description of the movements to be followed, which need not be in writing, but might be given by signs commonly used in the profession or by a series of photographs or films.[6]

1065. The Act of 1911 contains no definition of a musical work, but the Musical (Summary Proceedings) Copyright Act, 1902,[7] which is unrepealed, defines it as "any combination of melody and harmony or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced." The definition implies that in order to be the subject of copyright a musical composition must be fixed in some form of printing or writing. A musical work may be also a dramatic work, *e.g.* an opera. In two cases a single song was held to be a dramatic piece.[8] It has since, however, been held by the Court of Appeal in England that a song that does not require for its representation either acting or scenery is not a dramatic piece, although it is intended to be sung in appropriate costume on the music hall stage.[1] As there may be copyright in the adaptation of an old play, so in the case of musical compositions copyright may be secured for the re-arrangement or adaptation of an old piece of music, or for the adaptation of the music of an opera to a particular instrument, *e.g.* the pianoforte.[2]

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[1] Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 20.

[2] Act of 1911, s. 35 (1).

[3] *Tate* v. *Fullbrook*, [1908] 1 K.B. 827.

[4] Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15); Copyright Act, 1842 (5 & 6 Vict. c. 45).

[5] *Tate* v. *Thomas*, [1921] 1 Ch. 503.

[6] Copinger, 6th ed., p. 68.

[7] 2 Edw. VII. c. 15, s. 3.

[8] *Russell* v. *Smith*, 1848, 12 Q.B. 217; *Clark* v. *Bishop*, 1872, 25 L.T. 908.

SUBSECTION (2).—*Cinematograph Productions.*

1066. Cinematograph productions, "where the arrangement or acting form or the combination of incidents represented give the work an original character" are expressly stated to be included in dramatic works. As it was permissible before the Act of 1911 to dramatise any non-dramatic work provided the actual words were not used,[3] it would seem that the copyright was not infringed by the making of a cinematograph film.[4] Copyright, however, now includes "the sole right in the case of a literary, dramatic, or musical work to make . . . any cinematograph film by means of which the work may be mechanically performed."[5] Cinematograph is defined as including "any work produced by any process analogous to cinematography."[6]

1067. Whether the public exhibition of a film was a public performance of a work and therefore an infringement of copyright was never actually decided before the Act.[7] It is now clear that copyright may be so infringed. The Act provides that copyright includes the right to perform a work or any substantial part of it in public;[8] and performance means "any visual representation of any dramatic action in a work including such a representation made by means of any mechanical instrument."[9] It was held before the Act that a person who filmed a dramatic piece did not, by selling the films for exhibition, perform the dramatic piece or cause it to be performed within the meaning of the Act of 1833;[10] also that the exhibition of a film of a dramatic piece at the business premises of the cinematographer's prospective purchasers was not a public performance of the piece.[7] In a case decided under the Act the lessees of a film, who had agreed to exhibit it only at certain places, but advertised it for exhibition at other places, were held to have authorised a performance of the work within the meaning of the Act[5] and therefore to have infringed the copyright.[11]

1068. As regards the protection accorded to the film itself, a film may be regarded from two points of view: (1) as an "artistic work," consisting of a series of photographs; (2) as a "dramatic work," where the film consists of an arrangement of scenes as in an ordinary dramatic piece. The owner of the artistic copyright is the owner of the negative at the time when the negative was made, and if the work is a non-dramatic work, he will be the only owner of the copyright therein.[1] The owner of the dramatic copyright is the producer or person who arranges the scenes. A cinematograph production does not satisfy the requirements of a dramatic work unless the arrangement, or acting form, or the combination of incidents represented, give the work an original character.[2] It would, therefore, seem that films of scenes or events in real life are not entitled to the protection of dramatic copyright.[1] As between the person who writes the scenario or sketch and the producer who adapts it for screen purposes, arranges the scenes, and photographs them, the former is the owner of the copyright of the sketch, but the latter is the owner of the copyright of the film.[3] If as the result of assignation the copyright of a dramatic work and the performing rights are vested in different persons, the owner of the performing rights has the sole right to exhibit the work by means of a cinematograph film, but the owner of the copyright has the sole right to make the film.[4] In such a case, therefore, an exhibition of the work by means of a cinematograph film can only be given by agreement between the owners of the copyright and the owners of performing rights.[4]

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[1] *Fuller* v. *Blackpool Winter Gardens*, [1895] 2 Q.B. 429.

[2] Copinger, 6th ed., p. 71; *Wood* v. *Boosey*, 1868, L.R. 2 Q.B. 240; L.R. 3 Q.B. 223; *Boosey* v. *Fairlie*, 1877, 7 Ch. D. 301; *Leader* v. *Purday*, 1849, 7 C.B. 4; *Lover* v. *Davidson*, 1856, 1 C.B. (N.S.) 182.

[3] *Tinsley* v. *Lucy*, 1863, 32 L.J. Ch. 535; *Warne & Co.* v. *Seebohm*, 1889, 39 Ch. D. 73.

[4] Copinger, 6th ed., p. 218.
[5] Act of 1911, s. 1 (2).
[6] *Ibid.*, s. 35 (1).

[7] *Glenville* v. *Selig Polyscope Co.*, 1911, 27 T.L.R. 554, where the point was raised.

[8] Act of 1911, s. 1 (3).
[9] *Ibid.*, s. 35 (1).

[10] *Karno* v. *Pathé Frères, Ltd.*, 1909, 25 T.L.R. 242.

[11] *Fenning Film Service, Ltd.* v. *Wolverhampton, etc. Cinemas, Ltd.*, [1914] 3 K.B. 1171.

1069. As a dramatic work is not published by being performed in public,[5] a cinematograph exhibition of the work would seem not to be a publication of the work. This has an important bearing on the position of foreign cinematograph films as regards protection. The Act provides that copyright subsists in an unpublished work only where the author was, at the date of the making of the work, a British subject, or resident in the parts of the British dominions to which the Act extends.[6] A film made in a foreign country, such as America, with which this country has no international agreement, and which has obtained no Order in Council under s. 29 of the Act, is not entitled, therefore, to protection by having been first exhibited here. Protection for a dramatic film might, however, be obtained under agreements with the lessees, a breach of which might be restrained as a breach of contract or confidence; [7] or by the publication simultaneously in the foreign country and in this country of a description of the film, its plot, and the arrangement of scenes.[8]

SECTION 6.—ARTISTIC COPYRIGHT.

SUBSECTION (1).—*Definitions.*

1070. Artistic works include works of painting, drawing, sculpture, and artistic craftsmanship, and architectural works of art and engravings and photographs.[1] Works of sculpture include casts and models.[1] Architectural work of art means any building or structure having any artistic character or design, in respect of such character or design, or any model for such building or structure, provided that protection shall be confined to the artistic character and design and shall not extend to processes or methods of construction.[1] Engravings include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs.[1] Photographs include photolithographs and any works produced by any process analogous to photography.[1]

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[1] Copinger, 6th ed., p. 220.

[2] Act of 1911, s. 35 (1).

[3] *Milligan* v. *Broadway Cinema Productions, Ltd.*, 1923, S.L.T. 35.

[4] Copinger, 6th ed., pp. 221–222.

[5] Act of 1911, s. 1 (3).

[6] *Ibid.*, s. 1 (1).

[7] *Ibid.*, s. 31.

[8] Copinger, 6th ed., p. 223.

SUBSECTION (2).—*Artistic Works Generally.*

1071. It is thought that the term "artistic," like the term literary, is not used in relation to quality or style, but that it merely indicates the ways in which the various works included in artistic works may be produced. A simple outline drawing of a common object of trade, made for the purpose of illustrating a trade catalogue, has been held entitled to copyright protection as an artistic work.[2] In order to be the subject of copyright, the work must be an original work; [3] it must not be copied from another artistic work, such as an engraving from an engraving, a photograph from a photograph, or a painting from a painting.[4] An artistic work may be a copy of the work of another, although it has been made, not directly from that work itself, but by the use of intermediate copies or other indirect means.[5] But there is no monopoly in the subject of a work of art, and an artist is entitled to paint or draw a subject which has already been treated by another artist and to claim copyright for his work.[6] An engraving of a painting or drawing, like the photograph of an engraving or picture,[7] would probably be regarded as an original work, subject, however, to the rights of the artist from whose work the engraving was taken.

SUBSECTION (3).—*Book Illustrations.*

1072. Photographs may be the subject of copyright either by themselves or as illustrations in a book. Before the Act of 1911, if the owner of the copyright in the letterpress was also the owner of the copyright in the illustrations, the illustrations were protected under the Literary Copyright Act, 1842,[8] although the name and date had not been printed on them,[9] as required by the Fine Arts Copyright Act, 1862.[10] The ground for according protection to the illustrations under the Act of

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[1] Act of 1911, s. 35 (1).

[2] *Waters* v. *Huygen & Co.*, Macgillivray's Copyright Cases (1923–), p. 17.

[3] Act of 1911, s. 1 (1).

[4] Copinger, 6th ed., p. 75.

[5] *Hanfstaengl* v. *Baines*, [1895] A.C. 20, per Lord Shand at p. 30.

[6] *De Berenger* v. *Wheble*, 1819, 2 Stark 548; *Kenrick* v. *Lawrence*, 1890, 25 Q.B.D. 99; *Blackwell* v. *Harper*, 1740, 2 Atk. 92.

[7] *Graves'* case, 1869, L.R. 4 Q.B. 715.

[8] 5 & 6 Vict. c. 45.

[9] *Bogue* v. *Houlston*, 1852, 5 De G. & Sm. 267; *Davis* v. *Benjamin*, [1906] 2 Ch. 491.

[10] 25 & 26 Vict. c. 68.

1842 was that the Act gave protection to "books," and the illustrations were considered to be part of the book. It is thought that a book and its illustrations may no longer be the subject of a single copyright, as under the new Act it is not "books" but "literary works" to which literary copyright applies.[1]

SUBSECTION (4).—*Architects' Works.*

1073. Under the Act of 1911 protection is for the first time given in this country to architectural works as distinguished from an architect's plans and sketches. Plans are included in the definition of literary works,[2] but sketches and architectural works fall within artistic works. The effect of this may be to give a longer term of protection to plans than to sketches, as s. 17 of the Act of 1911, which secures copyright in the case of posthumous works until publication and for fifty years afterwards, applies only to literary, dramatic, or musical works, and engravings. The copyright in all artistic works other than engravings and including an architect's sketches would, therefore, expire in fifty years from the architect's death. The term "architectural works" is limited to "buildings or structures" "having an artistic character or design." [3] It is thought that the object of the provision is to prevent protection being claimed for something which has been erected in a certain way with a purely utilitarian purpose in view.[4] "Building or structure" would not include everything which has been held to be a building or structure under local building statutes. The term is to be construed reasonably, having regard to the object of the Act. Probably the building or structure must be of such a character as is usually erected from the ground from plans with elevations.[4]

SUBSECTION (5).—*Designs.*

1074. Designs which are to be applied by industrial processes are protected by registration under the Patents and Designs Act, 1907,[5] as amended by the Patents and Designs Act, 1919.[6] As defined in the latter Act, design means "only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device." [7] The protection given to designs registrable under these Acts is for a period of five years, renewable for two further periods of five years each,[8] and is conditional upon registration. See DESIGNS.

1075. There are certain designs, however, to which the protection of copyright is given by the Act of 1911. That Act provides that the Act is not to apply to the designs of works used or intended to be used as models or patterns to be multiplied by any industrial process, where the designs of such works are registrable under the Patents and Designs Act, 1907.[1] General rules may be made under s. 86 of the Patents and Designs Act, 1907, for determining the conditions under which a design shall be deemed to be used for the aforesaid purposes.[2] Under rules so made by the Board of Trade, a design is used or intended to be used for such purposes (and is therefore excluded from the protection of copyright under the Act of 1911)—(*a*) Where the design is reproduced, or is intended to be reproduced, in more than fifty single articles, unless all the articles in which the design is reproduced, or is intended to be reproduced, together form only a single set, as defined by rule 5 of the Designs Rules, 1908. Under this rule a set means "a number of articles of the same general character ordinarily on sale together or intended to be used together" [*e.g.* a dinner set], "all bearing the same design, with or without modification, not sufficient to alter the character, or not substantially affecting the identity thereof." Where there is any doubt whether the given articles do or do not constitute a set, the doubt is to be determined by the Controller of Patents. (*b*) Where the design is to be applied to (1) printed paper-hangings; (2) carpets, floor-cloths, or oil-cloths, manufactured or sold in lengths or pieces; (3) textile piece goods, or textile goods manufactured or sold in lengths or pieces; (4) lace, not made by hand. The fundamental distinction between designs registrable under the Patents and Designs Act, 1907, and designs protected as artistic works under the Copyright Act of 1911 probably is that an artistic work is bought purely for its artistic properties, whereas an article to which a design has been applied is bought not solely because of these, but because of the utility of the article apart from the design.[3] Although the design of an industrial object, *e.g.* a motor-car, is excluded from the protection of the Copyright Act, a photograph of the design will come within the Act as an artistic work, in which the copyright will be infringed by another photograph which reproduces a substantial part of it.[4] Where a design was the subject of copyright under the old law, the proprietor of such copyright is entitled to the substituted rights under s. 24 of the Act of 1911.[5]

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[1] Copinger, 6th ed., p. 78.

[2] Act of 1911, s. 35 (1).

[3] See Definitions, para. 1070, *supra*.

[4] Copinger, 6th ed., p. 213.

[5] 7 Edw. VII. c. 29.

[6] 9 & 10 Geo. V. c. 80.

[7] *Ibid.*, s. 19.

[8] 7 Edw. VII. c. 29, s. 53.

SECTION 7.—FIRST OWNER OF COPYRIGHT.

1076. Subject to certain exceptions, the author of a work is the first owner of the copyright therein.[6] A person who merely suggests the plot of a novel or play to the writer or the subject of a picture to the artist is not the author of the work.[1] In the case of photographs, the Fine Arts Copyright Act, 1862,[2] applied to them prior to the Act of 1911. Under that Act it was held that the author of a photograph was the person who controlled the operation of taking the photograph,[3] and not the members of the firm which employed a number of assistants but took no photographs themselves.[4] Now the person who was the owner of the negative at the time when the negative was made is to be deemed the author, including a body corporate, if it has established a place of business within the parts of the dominions to which the Act extends.[5] Where, in the case of an "engraving, photograph, or portrait," the plate or other original was ordered by some other person and was made for "valuable consideration," the person by whom the plate or other original was ordered is, in the absence of any agreement to the contrary, the first owner of the copyright.[6]

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[1] Act of 1911, s. 22 (1).

[2] *Ibid.*, s. 22 (2); as to the power of the Board under the subsection, see *Ware* v. *Anglo Italian Commercial Agency, Ltd.* (No. 2), Macgillivray's Copyright Cases, 1917–23, p. 371.

[3] Copinger, 6th ed., p. 81.

[4] *Ware* v. *Anglo-Italian Commercial Agency, Ltd.* (No. 2), *supra.*

[5] *Stephenson, Blake & Co.* v. *Grant, Legros & Co.*, 1917, 86 L.J. Ch. 93.

[6] Act of 1911, s. 5 (1).

1077. Several decisions were given under a somewhat similar provision with regard to paintings, drawings, and photographs in the Fine Arts Copyright Act, 1862.[7] In that Act the words used were "made or executed for or on behalf of any person for a good and valuable consideration." In two cases it was held, where celebrities gave a photographer a sitting for a photograph and paid him nothing but received complimentary copies, that the permission of the sitter did not constitute a good or valuable consideration, and that the photographer was the owner of the copyright.[8] But in a later case it was held that permitting a photographer to enter a school and to take photographs of the exterior and interior and of groups of pupils on the chance of selling copies to the proprietors of the school was a "good" consideration within the meaning of the Act, and that therefore the copyright in the photographs belonged to the proprietors of the school.[9] The Act of 1911 mentions only "valuable" consideration, and it requires not only that the plate or other original shall be made for valuable consideration, but also that the plate or other original shall be "ordered by some other person." It is, therefore, thought that the decision in the case last referred to could not be given under the Act of 1911. In a case decided under the Act two sketches intended for cut-out advertisement show-cards were shown to a firm of manufacturers who ordered a large number from the author at a price which gave the author a large profit. Sankey, J., held that the firm were the first owners of the copyright in the sketches, as the sketches were ordered by the firm and had been made for valuable consideration.[10]

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[1] Copinger, 6th ed., p. 93; *Shepherd* v. *Conquest*, 1856, 17 C.B. 427; *Kenrick* v. *Lawrence*, 1890, 25 Q.B.D. 99; *Tate* v. *Thomas*, [1921] 1 Ch. 503.

[2] 25 & 26 Vict. c. 68.

[3] *Melville* v. *Mirror of Life Co.*, [1895] 2 Ch. 531.

[4] *Nottage* v. *Jackson*, 1883, 11 Q.B.D. 627.

[5] Act of 1911, s. 21.

[6] *Ibid.*, s. 5 (1), proviso (*a*).

[7] See *Crooke* v. *Scots Pictorial Co.*, 1906, 14 S.L.T. 127.

[8] *Ellis* v. *Marshall & Son*, 1894, 64 L.J. Ch. 757; *Melville* v. *Mirror of Life Co.* (*supra*).

[9] *Stackemann* v. *Paton*, [1906] 1 Ch. 774.

[10] *Con Planck Co.* v. *Kolynos Incorp.*, [1925] 2 K.B. 804.

1078. It is to be noted that the exception in s. 5 (1) (*a*) of the Act applies only to "engravings, photographs, or portraits." Under the previous law a map might be protected as a "book" under the Literary Copyright Act, 1842, or as an "engraving" under the Engravings Acts;[1] but maps are now included in literary works,[2] so that the copyright belongs to the author, and not, as in the case of engravings, to the person by whom the plate or other original was ordered, unless the author of the map was in the employment of a person who ordered the original under a contract of service between him and the author.[3] The same applies to plans, which are also included in literary works.[2] An architect is, therefore, the first owner of the copyright in his plans, and also in his architectural works, unless the plans or works were made while he was in the employment of another under a contract of service.

1079. The exception with regard to works made under a contract of service reads as follows: "Where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright."[4] Whether a person is employed under a contract of service is a question of fact depending upon the degree of control exercised by the employer over the person employed. If the employer has the right to control and supervise the person employed during the execution of the work, the work is deemed to be done under a contract of service. Generally speaking, a person is not a servant whose services, like those of an architect, are in the nature of professional services. Physicians, surgeons, and anæsthetists employed at a hospital or infirmary have been held not to be servants.[5] An author who is employed to write a book for a publisher does not become the servant of the publisher, but if he is employed to write a work for a capital sum it has been held that the presumed intention is that the publisher is to be the owner of the copyright.[6] That will undoubtedly be the general rule. The case cited, which depended on the interpretation of s. 18 of the Literary Copyright Act, 1842, was decided with reference to the right of the editor of an encyclopædia and the contributor of articles to it, both of whom were paid for their work, to restrain the publishers from publishing the articles separately. The effect of the section was to vest in the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts the copyright in articles contributed to the composite work, if these articles were paid for and were contributed on the terms that the copyright should belong to the proprietor. No express agreement regarding copyright had been made with the publisher, but the House of Lords considered it was unreasonable to suppose that the publishers had paid only for the right to publish the articles in the encyclopædia, leaving the contributors free to publish their articles in separate form. It seems doubtful whether this decision would now hold good in view of the above express provision of the Act of 1911 giving the copyright to the employer only where the authors were in his employment under contracts of service. If this view is correct, then "in the absence of any agreement to the contrary" the person who edits a collective work, such as an encyclopædia, will be the owner of the copyright in the work as a whole, and the author of each article will be the owner of the copyright in his article.

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[1] Copinger, 6th ed., p. 78.

[2] Act of 1911, s. 35 (1).

[3] As to ownership of copyright in works made under a contract of service, see next para.

[4] Act of 1911, s. 5 (1), proviso (*b*).

[5] *Scottish Insurance Commrs.* v. *Edinburgh Royal Infirmary*, 1913 S.C. 607.

[6] *Lawrence & Bullen, Ltd.* v. *Aflalo and Cook*, [1904] A.C. 17.

1080. In the case where there is a contract of service the copyright of the servant's work will not belong to the employer unless the work was made "in the course of the employment." Thus the proprietors of a newspaper were held not to be entitled to the copyright of a translation which had been made by one of the staff of the newspaper in his spare time.[1] In making the employer the first owner of the copyright in works made under a contract of service, the Act, however, provides that where the work is an article or other contribution to a "newspaper, magazine, or similar periodical" the author shall be deemed to have reserved to him, in the absence of any agreement to the contrary, the right to restrain the publication of the work otherwise than as part of a newspaper, magazine, or similar periodical.[2] The right reserved to the author is not the right of copyright, but a mere quasi-contractual right to prevent publication otherwise than in a newspaper, etc.[3] The employer is entitled to publish the article in any other similar periodical, but neither he nor the author is entitled apart from mutual agreement to publish it as a separate article.

1081. Other exceptions regarding the first ownership of copyright are Government publications and mechanical reproductions. As to the former the Act provides that, without prejudice to any rights or privileges of the Crown (*i.e.* the royal prerogative in the Bible and the Book of Common Prayer), where any work has, whether before or after the commencement of the Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty.[4]

1082. The provision with regard to contrivances by means of which sounds may be mechanically reproduced is similar to that made in the case of photographs: the person who was the owner of the original plate at the time when the plate was made is to be deemed the author of the work, including a body corporate if it has established a place within the parts of the dominions to which the Act extends.[5]

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[1] *Byrne* v. *Statist Co.*, [1914] 1 K.B. 162 ; as to who are servants of the proprietors of a newspaper, see *In re Beeton & Co.*, [1913] 2 Ch. 279.

[2] Act of 1911, s. 5 (1), proviso (*b*).

[3] Copinger, 6th ed., pp. 197, 198.

[4] Act of 1911, s. 18.

[5] *Ibid.*, s. 19 (1).

SECTION 8.—DURATION OF COPYRIGHT.

SUBSECTION (1).—*General Period.*

1083. The period of protection now prescribed for all works, with certain minor exceptions, is during the life of the author and for fifty years after his death.[1] Under the Act of 1842 copyright in literary works published during the lifetime of the author endured either for the life of the author and seven years after his death or for forty-two years from the date of publication, whichever term should be the longer. An author's literary works, therefore, except in the unusual case of works published simultaneously, lost the protection of copyright at different times. Now they all fall into the public domain at one and the same time, viz. fifty years after the author's death.

SUBSECTION (2).—*Exceptions.*

1084. The cases excepted from the general period and for which special periods of protection are prescribed are: (1) photographs; (2) mechanical instruments; (3) Government publications; (4) joint works; (5) posthumous works; and (6) assignments. (1) Photographs. The period of protection is fifty years from the making of the original negative from which the photograph was directly or indirectly derived.[2] (2) Mechanical instruments. Copyright subsists in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, for fifty years from the making of the original plate from which the contrivance was directly or indirectly derived.[3] (3) Government publications. Where any work has been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.[4] (4) Joint works. In the case of a work of joint authorship, *i.e.* "a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors,"[5] copyright is to subsist during the life of the author who dies first and for fifty years after his death, or during the life of the author who dies last, whichever period is the longer.[6] (5) Posthumous works. In the case of literary, dramatic, and musical works and engravings in which copyright subsists at the death of the author, or in the case of works of joint authorship at or immediately before the death of the author who dies last, but which have not been published, nor in the case of dramatic or musical works been performed in public, nor in the case of lectures been delivered in public, before that date, copyright is to subsist till publication, or performance, or delivery in public, whichever may first happen, and for a term of fifty years thereafter.[1] It is to be noted that engravings are the only artistic works included in this provision. In the case of other artistic works, except photographs, copyright expires therefore in fifty years after the author's death, whether the works are published or not; in the case of photographs copyright runs from the date of the making of the negatives. (6) Assignments. Where the author of a work is the first owner of the copyright therein he cannot validly assign the copyright (otherwise than by will) beyond twenty-five years from the date of his death.[2] This does not apply to the assignment of the copyright in a collective work or a licence to publish a work, or part of a work, as part of a collective work.[2]

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[1] Act of 1911, s. 3.

[2] *Ibid.*, s. 21.

[3] *Ibid.*, s. 19 (1).

[4] *Ibid.*, s. 18.

[5] *Ibid.*, s. 16 (3).

[6] *Ibid.*, s. 16 (1).

SUBSECTION (3).—*Right to Reproduce on Payment of Royalty.*

1085. After the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of the Act of 1911, of thirty years, from the death of the author of a published work, any person may reproduce the work for sale if he proves that he has given notice in writing to the owner of the copyright and that he has paid to or for the benefit of the owner of the copyright a royalty on the sale of the work amounting to ten per cent. of the published price.[3] The Board of Trade are empowered to make regulations prescribing the mode in which notices are to be given, the particulars to be given in the notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.[3] Under regulations so made,[4] notice is to be sent by registered post to the owner of the copyright or his agent for the receipt of such notice not less than one month before any copies of the book are delivered to a purchaser. The notice must contain the following particulars: (*a*) name and address of the person intending to reproduce the work; (*b*) name of the work, and, if necessary, a description sufficient to identify it; (*c*) the manner in which it is intended to reproduce the work (*e.g.* whether by printing, lithography, photography, etc.); (*d*) the price or prices at which it is intended to publish the work; (*e*) the earliest date at which any of the copies will be delivered to a purchaser. Unless otherwise agreed, the royalties are to be paid by means of adhesive labels to be affixed to the copies of the work and to be procured from the owner of the copyright, who is to intimate to the person giving the notice a reasonably convenient place in the United Kingdom where such adhesive labels can be obtained. If the owner of the copyright cannot be found, notice to is be advertised in the *London Gazette* giving particulars (*a*) and (*b*) above and stating an address from which a copy of the notice giving all the particulars may be obtained. In that case, where the owner cannot be found, or in the case where the owner of the copyright has failed after fourteen days' notice to supply the labels or to intimate a place where they can be obtained, copies of the work may be delivered to purchasers without labels being affixed to them. The royalties are then to be a debt due to the owner of the copyright by the person reproducing the work.[1]

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[1] Act of 1911, s. 17 (1).
[2] *Ibid.*, s. 5 (2).
[3] *Ibid.*, s. 3.
[4] Copyright Royalty System (General) Regulations, 1912.

1086. This proviso in s. 3 of the Act with regard to compulsory reproduction on payment of royalties does not apply to the public performance of works, or to the production of unpublished works. In respect of these, therefore, an author has an exclusive monopoly for the full period of copyright. It would seem, also, that the right to reproduce compulsorily is limited to reproduction in the same form as the original, and does not, therefore, include a right, *e.g.* to produce a part of the work, or to incorporate the whole work in a larger work.[2] But under the proviso several works of the same author may be published together.[3]

1087. The proviso qualifies only the general period of protection laid down by the section, viz. the life of the author and fifty years after his death. It does not apply, therefore, in the absence of express provision to that effect, to works in respect of which special periods of protection are laid down by the Act.[4] Photographs and mechanical instruments, accordingly, do not come within the proviso.[5] In the case of posthumous works, it is expressly provided [6] that the proviso is to apply as if the author had died at the date of the publication of the work or of its performance or delivery in public. As regards works of joint authors, the application of the proviso is not so clear. In the section of the Act [7] prescribing the duration of copyright for joint works (viz. fifty years from the death of the author who dies first, or during the life of the author who dies last, whichever period is the longer) there is no express reference to the proviso in s. 3. The section, however, provides that references in the Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first, or after the death of the author who dies last, whichever period may be the shorter. The effect of this seems to be that a work of joint authorship may be compulsorily reproduced on payment of royalties either at the expiration of twenty-five years from the death of the author who dies first, or immediately on the death of the author who dies last, whichever date is the later.[8]

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[1] For a discussion as to whether in this respect the regulations are *intra vires* in view of reproduction being authorised by the Act only where the reproducer has paid royalties to or for the benefit of the owner of the copyright, see Copinger, 6th ed., p. 90.

[2] Copinger, 6th ed., p. 91; but *cf.* Macgillivray, Copyright Act, 1911, p. 47.

[3] *Osbourne* v. *Dent*, [1925] 1 Ch. 369.

[4] See para. 1084, *supra*.

[5] Copinger, 6th ed., p. 88; Macgillivray, Copyright Act, 1911, p. 50.

[6] Act of 1911, s. 17 (1).

[7] *Ibid.*, s. 16 (1).

[8] Copinger, 6th ed., p. 208; Macgillivray, Copyright Act, 1911, pp. 49–50.

SUBSECTION (4).—*Compulsory Licences.*

1088. If at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public, a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright has refused to republish or to allow the republication of the work, or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or to perform it in public, on such terms and subject to such conditions as the Judicial Committee may think fit.[1] This provision does not seem to apply to foreign works.[2] It applies to works of joint authors only on the death of the author who dies last.[3]

SECTION 9.—TRANSMISSION OF COPYRIGHT.

SUBSECTION (1).—*Generally.*

1089. Copyright is personal property. On the owner's death intestate the right passes to his personal representatives,[4] and in the case of his bankruptcy it vests in the trustee in sequestration. Where an author made a bequest of the annual income of his estate and died leaving both published and unpublished works, it was held that the proceeds from the published works were included as income in the bequest, but that the proceeds from the works published after his death were to be regarded as a *surrogatum* for such assets and fell to be invested as capital.[5] A bequest by a testator of "all his books" has been held to include manuscript notes left by him.[6] In the case of a work which has not been published, nor performed or delivered in public, if the ownership is acquired under a testamentary disposition made by the author, such ownership is to be *prima facie* proof of the copyright being with the owner of the manuscript.[7]

SUBSECTION (2).—*Assignation.*

1090. The owner of the copyright in a work may assign the right either wholly or partially and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which the Act of 1911 extends, and either for the whole term of the copyright or for any part thereof.[8] Self-governing dominions means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.[9]

1091. No special form of words is required in order to transfer copyright. The Act merely provides that the assignment shall be in writing signed by the owner or by his duly authorised agent.[1] Thus a receipt for the purchase-money will be sufficient, if it is clear that an assignment and not a mere licence is intended.[2] An agreement to give the author a royalty on every copy of the work sold, in consideration of his giving the publisher the exclusive right of printing and publishing a series of musical compositions in volume form, is a mere publishing agreement and not an assignment of the copyright in the various compositions. Under such an agreement, therefore, the publishers are not entitled to publish any of the compositions in a different series.[3]

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[1] Act of 1911, s. 4.

[2] Copinger, 6th ed., p. 87.

[3] Act of 1911, s. 16 (1).

[4] *Latour* v. *Bland*, 1818, 2 Spark, 382.

[5] *Davidson's Trs.* v. *Ogilvie*, 1910 S.C. 294.

[6] *Willis* v. *Curtois*, 1838, 1 Beav. 189.

[7] Act of 1911, s. 17 (2).

[8] *Ibid.*, s. 5 (2).

[9] *Ibid.*, s. 35 (1).

1092. Copyright is made up of several rights according to the various methods in which the work is capable of being reproduced. Thus in the case of a novel the rights to publish it, to translate it, and to convert it into a dramatic work may all be assigned to different persons. So in the case of a dramatic work, the performing rights may be assigned to one person and the cinematograph rights to another.[4] Such separate rights may also be assigned generally or subject to limitations as to time or locality. Each partial assignee will have the full rights of an owner of copyright in respect of the right assigned, but he will have no title to sue for infringement in respect of the exercise of any other right than the one assigned to him, however he may be damaged thereby.[5] The assignor warrants his title and is liable in damages for breach of warranty if his title turns out to be defective.[6]

1093. The exclusive right to sell or distribute copies is not part of copyright, but only an incidental right given to the owner in order to protect his right of reproduction. The grantee of such a right can sue third persons for infringing his right only where they do so knowingly.[7] One who has such a right of sale for a limited term may continue after the expiration of his right to sell copies which have been *bona fide* made during the term.

1094. The provision of the Act as to the assignability of copyright relates only to works wherein the assignor has the right,[8] and has therefore no application to works which are not in existence at the date of the assignment. But an agreement by an author that the copyright of his work when executed shall belong to another may entitle the assignee to specific performance or to a demand that the author shall permit him to sue for infringement in the name of the author as the legal owner.[9]

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[1] Act of 1911, s. 5 (2).

[2] *Kyle* v. *Jeffreys*, 1856, 18 D. at p. 911; 1859, 21 D. (H.L.) 8; *Levy* v. *Rutley*, 1871, L.R. 6 C.P. 523; *Lacy* v. *Toole*, 1867, 15 L.T. (N.S.) 512; *Tree* v. *Bowkett*, 1895, 74 L.T. (N.S.) 77; *London Printing and Publishing Alliance, Ltd.* v. *Cox*, [1891] 3 Ch. 291.

[3] *In re Jude's Musical Compositions*, [1907] 1 Ch. 651.

[4] For the several rights included in Copyright, see Act of 1911, s. 1 (2).

[5] *Dicks* v. *Brooks*, 1880, 15 Ch. D. 22.

[6] *Sims* v. *Marryat*, 1851, 17 Q.B. 281; 20 L.J. Q.B. 454.

[7] Macgillivray's Copyright Act, 1911, p. 60; *Landeker and Brown* v. *Wolff*, Macgillivray's Copyright Cases, 1905–10, p. 102.

[8] Act of 1911, s. 5 (2).

[9] *Sims* v. *Marryat*, *supra*; *Hazlitt* v. *Templeman*, 1866, 13 L.T. (N.S.) 593; *Leader* v. *Purday*, 1849, 7 C.B. 4; *London Printing and Publishing Alliance, Ltd.* v. *Cox*, [1891] 3 Ch. 291.

In a case decided under the Act a firm of publishers, who had secured an option from an author of the exclusive right to publish any one of her next three books during the legal term of copyright, were held entitled to restrain the author, and another firm of publishers who had notice of the agreement, from a breach of it. Kekewich, J., held (1) that the agreement of the author with the plaintiffs was a contract to sell the products of her labour, of which the Courts would grant specific performance, and (2) that the plaintiffs, on exercising their option, would become equitable owners of an interest in the copyright and were entitled to have their option protected against the author and the other publishers, the latter having notice of the plaintiff's agreement.[1] But, *semble*, an agreement to assign the copyright of a work not yet in existence would not be enforceable against an assignee to whom the copyright was assigned after the completion of the work and who took his assignation without notice of the previous agreement.[2]

Subsection (3).—*Licences.*

1095. The owner of the copyright in a work may, as an alternative to assigning the right, grant any interest in it by licence,[3] *e.g.* a licence to reproduce the work in a particular form. Like an assignation, a licence must be in writing, signed by the owner of the copyright or his duly authorised agent.[3] Before the Act of 1911 a bare licence passed no interest in the copyright, but created merely a contractual relationship between the parties. The licensee had, therefore, no right to sue third parties in his own name for infringement, but was obliged to join with himself as pursuer the owner of the copyright.[4] If the owner refused to sue, the licensee's only course was to make him a defender along with the infringer. The licensee, also, had merely an equitable interest which could not be asserted against the right of an assignee without notice of the licence.[5] It would appear that the grant in writing of an interest in the right by licence under the Act is intended to operate something more than the mere equitable interest conferred by a bare licence, viz. to attach it to the copyright as a statutory right, preferable to an assignation later in date, and entitling the licensee to sue for infringement in his own name.[6] It is thought that the provision was meant to cover the case where the grant is in the nature of a partial assignment, but expressed in the form of a licence.[7] In order to create a legal interest in the copyright the licence must be exclusive. A mere agreement, *e.g.* that a publisher shall publish the first edition of a work, will not confer on him the right to restrain the publication of another edition until all the first edition is sold.[1] An owner of copyright who has granted an exclusive licence cannot sue without the consent of the licensee.[2] A licence is assignable, unless where the licensee has been chosen on account of his personal skill or reputation and his right is, therefore, that of a bare licence and not a partial assignment of copyright.[3]

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[1] *Erskine Macdonald, Ltd.* v. *Eyles*, [1921] 1 Ch. 63.

[2] Copinger, 6th ed., p. 105; cf. *Ward, Lock & Co.* v. *Long*, [1906] 2 Ch. 105.

[3] Act of 1911, s. 5 (2).

[4] *Neilson* v. *Horniman*, 1909, 25 T.L.R. 685; *Macmillan* v. *Dent*, [1907] 1 Ch. 107.

[5] *London Printing and Publishing Alliance, Ltd.* v. *Cox*, [1891] 3 Ch. 291.

[6] Macgillivray's Copyright Act, 1911, p. 64; Copinger, 6th ed., p. 114.

[7] Copinger, *ubi cit.*

SUBSECTION (4).—*Limitation of Assignability, etc.*

1096. Where the author of a work is the first owner of the copyright therein, no assignment of the copyright, or grant of any interest therein, made by him (otherwise than by will) after the passing of the Act of 1911 is to be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author. On the author's death the reversionary interest expectant on the termination of the twenty-five years is to devolve on his legal personal representatives, any agreement to the contrary being null and void.[4] This proviso to s. 5 (2) of the Act of 1911 only applies where the author was the first owner of the copyright. In the case of engravings, photographs, or portraits, where the plate or other original was ordered by some other person and was made for valuable consideration, the person by whom the plate or other original was ordered is the first owner of the copyright;[5] and in the case of works made under a contract of service or apprenticeship, the employer is the first owner.[6] In such cases, therefore, the copyright may be assigned for the full period of its duration. The proviso is expressed as not applying to the assignment of the copyright in a collective work (such as a newspaper or encyclopædia) or to a licence to publish a work or part of a work as part of a collective work. Accordingly the author of the complete collective work, *i.e.* the person who edits it and arranges the various contributions, may assign the copyright for the whole term, and the individual contributors may assign for the like period the right to reproduce their contributions as part of the collective work; but an assignment of the copyright in a contribution cannot confer a right to publish it separately beyond the period of twenty-five years after the contributor's death.

1097. The proviso should be read in conjunction with the proviso in s. 3 of the Act which entitles any person after the expiration of twenty-five years from the author's death to reproduce the work on paying a royalty of ten per cent. of the published price to the owner of the copyright. It is thought that neither of these provisos applies to photographs or mechanical instruments.[7] The limitation of assignability applies equally to works in existence at the commencement of the Act of 1911. But such works cannot be compulsorily reproduced on payment of royalty until thirty years after the author's death.[1] In their case there is therefore a hiatus of five years during which the copyright is re-vested in the author's representatives and no one can claim to reproduce on royalty basis.

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[1] *Warne* v. *Routledge*, 1874, L.R. 18 Eq. 497.

[2] *Taylor* v. *Neville*, 1878, 26 W.R. 299; *Tree* v. *Bowkett*, 1895, 74 L.T. 77.

[3] *In re Jude*, [1907] 1 Ch. 651; *Hole* v. *Bradbury*, 1879, 12 Ch. D. 886; *Cooper* v. *Stephens*, [1895] 1 Ch. 567; *Booth* v. *Richards*, Macgillivray's Copyright Cases, 1905–10, p. 284.

[4] Act of 1911, s. 5 (2), proviso.

[5] *Ibid.*, s. 5 (1), proviso (*a*).

[6] *Ibid.*, s. 5 (1), proviso (*b*).

[7] Macgillivray's Copyright Act, 1911, p. 50; Copinger, 6th ed., pp. 88, 111.

SECTION 10.—INFRINGEMENT OF COPYRIGHT.

SUBSECTION (1).—*Generally.*

1098. Copyright in any work, whether literary, dramatic or musical, or artistic, is deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is conferred on the owner of the copyright.[2] The rights conferred by the Act on owners of copyright the invasion of which constitutes infringement are: (1) to produce or reproduce the work or any substantial part thereof in any material form; (2) to perform the work, or any substantial part thereof, in public; (3) to publish the work, if unpublished, or any substantial part thereof.[3] These rights include the sole right (*a*) to produce a translation of the work: (*b*) in the case of a dramatic work to convert it into a novel or other non-dramatic work; (*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work by way of performance in public or otherwise; and (*d*) in the case of a literary, dramatic, or musical work to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed.[3]

1099. The Act also confers on the owner of copyright the sole right to authorise any such acts as aforesaid.[3] Under the old law he had the sole right to cause to be done any of the acts in respect of which a monopoly was conferred on him. It was held that a person did not cause an infringement unless he did it by his servant or agent.[4] But a person who employed a singer to sing in his music-hall was held bound to make inquiries as to the copyright of the songs intended to be sung, and he was liable as having caused the performance if the singing of any of the songs was an infringement of copyright.[5] It was considered doubtful whether the use of the word "authorise" in the Act of 1911 made any difference in the law,[6] but the Court of Appeal has recently held that a person may sanction, approve, or countenance an infringement, although the infringer is neither his servant nor his agent.[7]

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[1] Act of 1911, s. 3. [2] *Ibid.*, s. 2 (1). [3] *Ibid.*, s. 1 (2).

[4] *Kelly's Directories* v. *Gavin and Lloyds*, [1901] 1 Ch. 374; *Karno* v. *Pathé Frères, Ltd.*, 1909, 25 T.L.R. 242; *Bolton* v. *London Exhibitions*, 1898, 14 T.L.R. 550.

[5] *Monaghan* v. *Taylor*, 1885, 2 T.L.R. 685; cf. *Performing Right Society* v. *Ciryl Theatrical Syndicate*, [1924] 1 K.B. 1.

[6] Copinger, 6th ed., p. 118; Macgillivray's Copyright Act, 1911, p. 26.

[7] *Falcon* v. *Famous Players Film Co.*, [1926] 2 K.B. 474.

1100. Copyright is infringed, not only by a person who commits any of the above direct acts of infringement, but also by one who (*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or (*b*) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or (*c*) by way of trade exhibits in public; or (*d*) imports for sale or hire into any part of the British dominions to which the Act extends any work which to his knowledge infringes or would infringe copyright if it had been made within the part of the British dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.[1] It is to be noted that whereas direct infringements are actionable whether committed knowingly or not,[2] acts of the above class, consisting in dealing with infringing works, require proof of knowledge. The provision applies only to acts done within the territorial limits to which the Act extends.[3] A sale is not made in this country where goods are ordered from abroad and despatched here, the sale being completed by the delivery of the goods to the carrier in the foreign country.[4] Goods which are not in a dealer's possession are not offered by him for sale where he quotes a price, being invited to do so, and expresses his willingness to negotiate a sale.[5] As regards the importation of infringing works, a person is not liable unless he imports the works for sale or hire and also knows that the works infringe copyright or would infringe it if made within the territorial limits into which the importation takes place.

1101. The Act of 1911 contains the following further provisions with regard to infringing copies. The importation of such copies into the United Kingdom is to be prohibited where the proprietor of the copyright gives notice in writing to the Commissioners of Customs and Excise as to any copies which he desires should not be imported.[6] This provision is to apply, with the necessary modifications, to the importation into a British possession to which the Act extends of copies of works made out of that possession.[7] All infringing copies of a work or of any substantial part thereof, and all plates used or intended to be used in their production are to be deemed to be the property of the owner of the copyright, who may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.[8]

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[1] Act of 1911, s. 2 (2).

[2] *Scott* v. *Stanford*, 1867, L.R. 3 Eq. 718; *Mansell* v. *Valley Printing Co.*, [1908] 2 Ch. 441; *Byrne* v. *Statist Co.*, [1914] 1 K.B. 622.

[3] "*Morocco Bound*" *Syndicate, Ltd.* v. *Harris*, [1895] 1 Ch. 534; *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works*, [1898] A.C. 200; *Badische Anilin und Soda Fabrik* v. *Hickson*, [1906] A.C. 419.

[4] *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works, supra.*

[5] *Wolff* v. *Wood*, Macgillivray's Copyright Cases, 1901–4, p. 69.

[6] Sec. 14 (1).

[7] Sec. 14 (7).

[8] Sec. 7.

Subsection (2).—*Literary Copyright.*

(i) *What amounts to Infringement.*

1102. The invasion of an author's sole right to produce or reproduce his work or any substantial part thereof in any material form is usually called piracy. Where there is pure piracy, or the copying of a whole work, there seldom arises any question of difficulty, if the proprietorship of the copyright be not in doubt. It is an infringement of copyright to multiply copies of another person's work, even although the copies are not for sale.[1] Copying in manuscript is an infringement quite as much as printing;[2] so also is printing in shorthand.[3] *Bona fides* is no defence.[4]

1103. Infringement or piracy is generally committed by the copying of part of a work. It is closely connected with the division of this article which deals with what may be the subject of literary copyright, and reference is made to the cases there cited, which are nearly all examples of infringement. A similarity between two works is not necessarily conclusive of the later work being an infringement of the earlier, as it is open to anyone to go to sources common to all and produce something which resembles an earlier work.[5] To establish infringement, it must be shewn that the later author has appropriated a substantial part of the earlier work. Whether he has done so or not, is a question of fact in each case.[6] For its determination the following are among the considerations which are relevant, viz. (1) the proportion which the part taken bears to the infringing work and to the work infringed; (2) whether the infringing work is likely to compete with the work infringed; and (3) whether there was any intention to copy or whether the copying was casual and inadvertent. "The recovery of the manuscript or the product of scissors and paste might furnish convincing evidence."[7]

1104. If an author or compiler is making a work from sources common to all, he must do original work, and must not merely copy a predecessor in the same field. For example, the compiler of a directory, a guidebook, or statistical returns, containing information derived from sources common to all, which must of necessity be identical in all cases if correctly given, is not entitled to spare himself the labour and expense of original inquiry by adopting and republishing the information contained in previous works on the same subject. He must obtain and work out the information independently for himself;[1] although he may use a previous work for the purpose of verifying results.[2] So in the case of a descriptive catalogue of fruit and trees, he may use a previous work as a guide, but he must write his own descriptions from common sources of information.[3] But the principle that matter derivable from common sources is available to all has no application to the case where quotations have been selected to illustrate an edition of a work. The critical skill and taste which dictated the selection is an act of authorship, the appropriation of which will be restrained in other editions of the work.[4]

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[1] *Novello* v. *Ludlow*, 1852, 12 C.B. 177; *Ager* v. *P. & O. Steamship Co.*, 1884, 26 Ch. D. 637.

[2] *Novello* v. *Ludlow*, *supra*; *Warne* v. *Seebohm*, 1888, 39 Ch. D. 73.

[3] *Nicols* v. *Pitman*, 1884, 26 Ch. D. 374.

[4] Para. 1100, cases in note 2, *supra*.

[5] *Pike* v. *Nicholas*, 1870, L.R. 5 Ch. 251; *Kenrick* v. *Lawrence*, 1890, 25 Q.B.D. 99.

[6] *Pike* v. *Nicholas*, *supra*.

[7] *Harper's, Ltd.* v. *Barry, Henry & Co., Ltd.*, 1892, 20 R. 133, per Lord M'Laren at p. 144. For a curious case of accidental likeness, see *Reichardt* v. *Sapte*, [1893] 2 Q.B. 308.

(ii) *Exceptions to Author's Monopoly.*

1105. The exclusive right of an author to reproduce any substantial part of his work is by the Act of 1911 made subject to certain exceptions. Among these is included "Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary."[5] It is thought that fair dealing is limited to purposes different from those of the work used, regard being had to the consideration whether the two works are likely to compete with one another.[6] The right to use a work for private study is for the first time expressly recognised. This would include the making of digests and abridgements, but it seems doubtful whether the multiplication of copies of these would now come within the limits of fair dealing.[7] The right of newspaper summary is a new right.[8] It is doubtful if the proviso applies to unpublished documents and papers, but it would clearly permit fair dealing with a dramatic work, which is not published by being publicly performed.

1106. Dealing with a work for the purpose of research naturally includes the right to publish the results of such research. In this connection Lord Ellenborough said: "That part of the work of one author is found in another is not of itself piracy or sufficient to support an action; a man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science and the benefit of the public; but, having done so, the question will be, was the matter so taken used fairly with that view, and without what I may term the *animus furandi*? . . . While I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles on science."[9] It is difficult to reconcile the absolute right of an author with the freedom of using the results of other men's labours which is necessary for the advancement of learning and science. The *animus furandi* cannot be the sole test, as *bona fides* in copying is not a good defence; but the presence or absence of the *animus furandi* may throw light upon the question whether a fair use has been made of a predecessor's work.[1]

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[1] *Kelly* v. *Morris*, 1866, L.R. 1 Eq. 697; *Morris* v. *Wright*, 1870, L.R. 5 Ch. 279; *Morris* v. *Ashbee*, 1868, L.R. 7 Eq. 34; *Scott* v. *Stanford*, 1867, L.R. 3 Eq. 718; *Kelly's Directories* v. *Gavin and Lloyds*, [1902] 1 Ch. 631.

[2] *Kelly* v. *Morris*, *supra*; *Morris* v. *Wright*, *supra*; *Leslie* v. *Young*, 1893, 20 R. 1077; 1894, 21 R. (H.L.) 57.

[3] *Hogg* v. *Scott*, 1874, L.R. 18 Eq. 444.

[4] *Black* v. *Murray & Son*, 1870, 9 M. 341; *Moffat and Paige* v. *Gill & Sons*, 1901, 84 L.T. 456; 1902, 86 L.T. 465.

[5] Sec. 2 (1) (i).

[6] Copinger, 6th ed., p. 122; Macgillivray's Copyright Act, 1911, p. 27; *Ager* v. *P. & O. Steamship Co.*, 1884, 26 Ch. D. 637; *Anderson* v. *Lieber Code Co.*, [1917] 2 K.B. 469.

[7] See para. 1110, *infra*.

[8] See para. 1057, *supra*.

[9] *Cary* v. *Kearsley*, 1802, 4 Esp. 167.

1107. The use of a work for the purpose of criticism or review has always been recognised. Copious extracts are permitted for the purpose of a review. But if these are so extensive as to extract the whole value, or the most valuable part, of the work of an author, there will be infringement.[2] "Acknowledged quotations, even from copyright works, if they are quotations fairly made, either for the purposes of criticism or illustration, are not infringements of copyright. . . . If, indeed, the quotation is colourable and made for the mere purpose of inserting a large portion of the copyright work, the result would be different."[3] Examples of cases where extracts have been held as not exceeding the limits of fair quotation,[4] and cases in which they have been held as so exceeding,[5] are cited below. It is a jury question in each case.[6] Where there is quotation or copying in works other than reviews, the question will be, Is the amount taken substantial?[7]

1108. Another user which the Act provides shall not constitute infringement of copyright is the "publication in a collection, mainly composed of non-copyright matter, *bona fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works, not themselves published for the use of schools, in which copyright subsists: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged."[8] This paragraph of the proviso would seem not to permit of the taking of parts of musical or dramatic works, or illustrations from artistic works;[9] nor would it seem, from the use of the words "short passages," to apply to maps, charts, plans, tables and compilations, which fall within literary works.[10]

(iii) *Public Performance.*

1109. The exclusive right of public performance, which previously applied only to dramatic and musical works, is for the first time extended to literary works by the Act of 1911.[1] The Act, however, expressly excepts from acts constituting infringement "the reading or recitation in public by one person of any reasonable extract from any published work."[2] Under the old law even dramatic works were unprotected from public reading or recitation. The reading or recitation of an unreasonable extract would now be an infringement of copyright. Performance means "any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of a mechanical instrument."[3]

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[1] *Jarrold* v. *Haywood*, 1870, 18 W.R. 279; *Jarrold* v. *Houlston*, 1857, 3 K. & J. 708; *Ager* v. *P. & O. Steamship Co.*, 1884, L.R. 26 Ch. D. 637; *Atlas Co.* v. *Fullerton*, report by J. M. Duncan.

[2] Bell, Com. (M'Laren's ed.), i. 117.

[3] *Black* v. *Murray & Son*, 1870, 9 M. 341, per Lord Kinloch at p. 356.

[4] *Whittingham* v. *Wooler*, 1817, 2 Swan. 428; *Bell* v. *Whitehead*, 1839, 8 L.J. (N.S.) Ch. 141.

[5] *Campbell* v. *Scott*, 1842, 11 Sim. 31; *Smith* v. *Chatto*, 1874, 31 L.T. 775; *Maxwell* v. *Somerton*, 1874, 30 L.T. 11; cf. *Walter* v. *Steinkopff*, [1892] 3 Ch. 489.

[6] Bell, Com. (M'Laren's ed.), i. 118.

[7] *Bohn* v. *Bogue*, 1846, 10 Jur. 420.

[8] Sec. 2 (1) (iv).

[9] Macgillivray's Copyright Act, 1911, p. 34; Copinger, 6th ed., p. 126.

[10] Sec. 35 (1).

(iv) *Colourable Imitations.*

1110. An author's sole right to produce his work or any substantial part thereof is infringed by the making of any colourable imitation of the work. This is the result of the provision that "infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation made or imported in contravention of the provisions of the Act of 1911.[3] What is a colourable imitation of a work is a question of fact. It would seem that the following derivative works would fall within the meaning of colourable imitations, viz. (1) a translation of a literary work; (2) a dramatic version of a non-dramatic work; (3) a non-dramatic version of a dramatic work; (4) an abridgement of a literary work. The Act of 1911 expressly reserves to an author the exclusive right to make any of the first three kinds of derivative works. As regards abridgements, the old law was that abridgements were entitled to protection if they were true abridgements in the sense of preserving the entire substance in condensed form but in language different from the original.[4] But in later cases the Courts have been inclined to view the work of an abridger as an infringement of copyright,[5] and it is doubtful if abridgements would now be permitted.[6]

SUBSECTION (3).—*Dramatic and Musical Copyright.*

(i) *Reproduction in Material Form.*

1111. Copyright in a dramatic work, as in the case of a literary work, is infringed by the reproduction of any substantial part of it.[7] As to what amounts to a substantial part of a dramatic work, see the cases undernoted.[8] In the case of dramatic works infringement generally consists in the taking of incidents and dramatic situations from the original work. Although no single sentence need be taken,[1] there will be infringement if incidents and dramatic situations are reproduced substantially in the order and arrangement of the original.[2] There is no infringement in a reproduction of ideas and incidents derived from common stock, as in that case there is no similarity of original matter.[3] There would appear to be no copyright in a mere plot.[4]

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[1] Sec. 1 (2). [2] Sec. 2 (1) (vi). [3] Sec. 35 (1).

[4] *Gyles* v. *Wilcox*, 1740, 2 Atk. 142; *Tonson* v. *Walker*, 1752, 2 Swans. 672; *Butterworth* v. *Robinson*, 1801, 5 Ves. 709; *Dodsley* v. *Kinnersley*, 1761, Amb. 403; *D'Almaine* v. *Boosey*, 1835, 1 Y. & C. Ex. 288.

[5] *Dickens* v. *Lee*, 1844, 8 Jur. 183; *Tinsley* v. *Lacy*, 1863, 1 H. & M. 747; *Spiers* v. *Brown*, 1858, 6 W.R. 352.

[6] Macgillivray's Copyright Act, 1911, p. 31; Copinger, 6th ed., p. 138.

[7] See para. 1098, *supra*.

[8] *Planché* v. *Braham*, 1837, 4 Bing. (N.C.) 17; *Chatterton* v. *Cave*, 1878, L.R. 10 C.P. 572; 3 App. Cas. 483; *Daly* v. *Palmer*, 1868, 6 Blatch. (Amer.) 256.

1112. In the case of a musical composition, it has been held to be an infringement to publish the airs of an opera in the form of quadrilles or waltzes.[5] Under the old law infringement consisted in the making of "copies" of a "sheet of music." It was accordingly held to be no infringement to make a perforated roll for the pianola,[6] or a gramophone or phonograph record.[7] Now, in the case of a literary, dramatic, or musical work, the exclusive right of making "any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered," is vested in the author as part of his copyright.[8]

(ii) *Performance in Public.*

1113. Copyright in a dramatic or musical work is infringed by the performance of the work or of any substantial part thereof in public.[9] In order to constitute infringement, it is not necessary that the performance should be for profit,[10] or that the place should be one where public performances are habitually held.[10] But it must not be a domestic and private representation—a representation for the amusement of one's household and friends.[11] It must be a representation for the entertainment of members of the public who are admitted as such.[12] Performance is defined by the Act of 1911 as meaning "any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument." [13] It would seem that a person performs a work who renders it audible by means of a wireless apparatus, and if the performance is public there will be an infringement of copyright.[1] Broadcasting also is an infringement.[2]

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[1] *Correlli* v. *Gray*, 1913, 29 T.L.R. 570; 30 T.L.R. 116.

[2] *Rees* v. *Melville*, Macgillivray's Copyright Cases, 1911–16, p. 168. For a strange case of accidental likeness between two plays, one of which was held not to be an infringement of the other, see *Reichardt* v. *Sapte*, [1893] 2 Q.B. 308.

[3] *Robl* v. *Palace Theatres*, 1911, 28 T.L.R. 69; *Bagge* v. *Miller*, Macgillivray's Copyright Cases, 1917–23, p. 179.

[4] *Rees* v. *Melville, supra.*

[5] *D'Almaine* v. *Boosey*, 1835, 1 Y. & C. Exch. 288; see also *Leader* v. *Purday*, 1849, 7 C.B. 4; *Lover* v. *Davidson*, 1856, 1 C.B. (N.S.) 182; *Wood* v. *Boosey*, 1868. L.R. 2 Q.B. 240; L.R. 3 Q.B. 223; *Boosey* v. *Fairlie*, 1877, 7 Ch. D. 301; 1879, 4 App. Cas. 711.

[6] *Boosey* v. *Wright*, [1900] 1 Ch. 122; *Mabe* v. *Connor*, [1909] 1 K.B. 515.

[7] *Monckton* v. *The Gramophone Co.*, 1912, 106 L.T. 84.

[8] Act of 1911, s. 1 (2) (*d*).

[9] *Ibid.*, s. 1 (2).

[10] *Ducks* v. *Bates*, 1884, 13 Q.B.D. 843, per Brett M. R. at p. 846.

[11] *Ibid.*, at p. 847.

[12] *Ibid.*; see also *Harms* (*Incorporated*) v. *Martan's Club, Ltd.*, [1926] W.N. 305.

[13] Act of 1911, s. 35 (1).

(iii) *Liability of Proprietor, Lessee, or Occupier of Place of Entertainment.*

1114. Copyright in a work is also to be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.[3] It is to be noted that the offender must have permitted the use of the place of entertainment for his private profit. It would not be necessary that he should receive a fixed sum: an agreement for a share of the profits would be sufficient, even although there were no profits. An innocent offender is not to be liable, but there is laid on him the burden of proving that he was not aware, and had no reasonable ground for suspecting, that an offence would be committed. Under the old law liability lay for causing a dramatic work to be represented without the written consent of the owner of the copyright. A person who let a place of entertainment to another who gave the entertainment was not liable for an infringement where he did not by himself or his agent take part in the entertainment.[4] But a proprietor who let his theatre and company of actors and actresses to another for one night was held liable, on the ground that the company and establishment were his own and he had full power of supervision and control.[5] So, where the proprietor of a music-hall engaged a singer who infringed copyright, and he was in the hall when the particular song was sung but had never heard the whole of it, it was held that he was liable, as he had hired the singer to sing what songs he liked and no supervision was exercised as to copyright.[6] But where the lessee of a theatre had engaged a band to perform under the direction of a bandmaster, and in the lessee's absence the band performed copyright musical works, it was held that the lessee was not liable either for authorising the performance of the works or for permitting the theatre to be used for their performance.[7]

1115. In order to constitute an infringement of this section of the Act, the performance must be at a theatre or other place of entertainment. Under 3 & 4 Will. IV. c. 15, s. 2, which made it an infringement to represent or cause to be represented a drama at "any place of dramatic entertainment," it was held that a room where a dramatic entertainment was performed was for the time being a place of dramatic entertainment within the meaning of the statute.[1] An opinion expressed by Brett, M. R.,[2] to a similar effect was corrected by him in a later case in which it was held that the place must be one to which the public are admitted as such.[3]

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[1] Copinger, 6th ed., p. 154.

[2] *Messager* v. *British Broadcasting Co.*, [1927] W.N. 243; *cf.* an Australian case, *Chappell* v. *Associated Radio Co. of Australasia, Ltd.*, 1925, Victoria L.R. 350.

[3] Act of 1911, s. 2 (3).

[4] *Russell* v. *Briant*, 1849, 8 C.B. 836; *Lyons* v. *Knowles*, 1863, 3 B. & S. 556.

[5] *Marsh* v. *Conquest*, 1864, 17 C.B. 418; 35 L.J. C.P. 319.

[6] *Monaghan* v. *Taylor*, 1885, 2 T.L.R. 685.

[7] *Performing Right Society* v. *Ciryl Theatrical Syndicate*, [1924] 1 K.B. 1.

SUBSECTION (4).—*Artistic Copyright.*

1116. Under the old law artistic copyright was infringed (1) in the case of paintings, drawings, and photographs, by repeating, copying, imitating, or otherwise multiplying them or the design thereof for sale, hire, exhibition, or distribution; [4] (2) in the case of engravings and lithographs, by in any manner copying them in the whole or in part, by varying, adding to, or diminishing from the main design; [5] (3) in the case of sculptures, models, and busts, by making or importing, or causing to be made or imported any pirated copy or cast of the original sculpture.[6] The Act of 1911, in providing that copyright in an artistic work is infringed by the invasion of the author's exclusive right to reproduce the work or any substantial part thereof,[7] seems wide enough to cover the various methods of reproduction prohibited under the statutes previously in force. It would appear that under the new Act authors of artistic works enjoy an even wider protection. Under the old law a *tableau vivant* representation of a picture was not an infringement of copyright in the picture; [8] but the Act of 1911 has been held to have the effect of making living pictures infringements of copyright where the resemblance is such that they can be regarded as reproductions of the whole or of a substantial part of the original picture.[9] It was also held prior to the Act of 1911 that a pattern for wool work taken from an engraving was not a copy of the engraving, as it did not copy or imitate anything which was the work of the engraver; [10] but it seems doubtful if this decision would now apply in view of the prohibition against reproduction in any material form.[11]

1117. An unauthorised photograph of a picture, or of the engraving of a picture,[12] is an infringement of copyright in the picture. But where copies in any form of a work of art are permitted to be made by the owner of the copyright, it is not an infringement to use the copies for purposes other than those permitted.[1] Thus, where the proprietors of the copyright in an engraving gave a licence to a firm of publishers to use the picture once only as a small wood-block in a pamphlet illustrative of certain pictures, it was held that the defendants, who had purchased a number of the pamphlets and cut out the wood-cut in question and mounted them on cards for sale, had not "repeated, copied, colourably imitated, or otherwise multiplied the picture.[1] The exclusive right of an author of a work of art to reproduce his work in any material form would seem to prohibit the reproduction in the flat of a work in the round, and *vice versa*.[2]

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[1] *Russell* v. *Smith*, 1848, 12 Q.B. 217.

[2] *Wall* v. *Taylor*, 1883, 11 Q.B.D., at p. 108.

[3] *Ducks* v. *Bates*, 1884, 13 Q.B.D., 843, at pp. 846–7.

[4] Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 6.

[5] Prints Copyright Act, 1777 (17 Geo. III. c. 57); 14 & 15 Vict. c. 12, s. 14, extending Act to lithographs.

[6] Sculpture Copyright Act, 1814 (54 Geo. III. c. 56), s. 3.

[7] Secs. 2 (1) and 1 (2).

[8] *Hanfstaengl* v. *Empire Palace*, [1894] 2 Ch. 1; cf. *Hanfstaengl* v. *Baines & Co.*, [1895] A.C. 20.

[9] *Bradbury, Agnew & Co.* v. *Day*, 1916, 32 T.L.R. 349.

[10] *Dicks* v. *Brooks*, 1880, 15 Ch. D. 22.

[11] Copinger, 6th ed., p. 162.

[12] *Ex parte Beal*, 1868, L.R. 3 Q.B. 387.

1118. The Act of 1911 excepts the following acts from those which may constitute an infringement of artistic copyright: (1) where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of the work;[3] (2) the making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art.[4] The first excepted user would enable an artist who is not the owner of the copyright in his work to make use of some of his matter for the purpose of a new work; for example, in the case of a completed work consisting of a group of persons, he would be at liberty to use his studies for the reproduction of the individual figures. As regards the making of copies of works permanently situated in a public place or building, the liberty applies only to the copying of works of sculpture or artistic craftsmanship. The Act contains no definition of a public place or building, but probably the liberty of copying is confined to national and municipal galleries or museums, and does not extend to privately owned places and buildings, such as theatres and the like.

SECTION 11.—REMEDIES FOR INFRINGEMENT.

SUBSECTION (1).—*Civil Remedies.*

1119. The Act of 1911 provides that, where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by the Act, be entitled to all such remedies by way of interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.[5] As already stated, copyright is infringed not only by the unauthorised reproduction of a copyright work in any material form, but also by the incidental acts of selling, offering, or importing the reproduction for sale or hire.[6] The remedies provided by the subsection just quoted are (1) interdict, and (2) an action of damages or for an account and profits.

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[1] *Frost and Reed* v. *Olive Series Publishing Co.*, 1908, 24 T.L.R. 649.

[2] Copinger, 6th ed., p. 163.

[3] Sec. 2 (1) (ii).

[4] Sec. 2 (1) (iii).

[5] Sec. 6 (1).

[6] Sec. 2 (2).

1120. Interim interdict will be granted unless there is a real issue on the facts or a question of law to be decided.[1] Upon proof of infringement the Court will grant interdict without proof of actual damage, but there must be probability of damage.[2] If only a part of the infringing work has been pirated, an interdict may be granted against the whole of the work, unless the pirated part is separable from the rest of the work.[3] The remedy of interdict is not to be available to an architect in respect of a building the construction of which has been commenced; nor are the provisions of the Act providing for the delivery up of infringing copies or imposing summary penalties to apply to such a case.[4]

1121. As regards a claim for damages, the measure will be the actual loss suffered owing to decrease in the sale of the original work.[5] The owner of the copyright may also be entitled to damages of an indirect kind, as where the infringing work has injured the reputation of the original.[6] He may sue, as an alternative to the claim for damages, for an account and profits, but he is not entitled to both remedies.[7] The profits recoverable are the net profits.[8]

1122. In any action for infringement the work is to be presumed to be a work in which copyright subsists, and the pursuer is to be presumed to be the owner of the copyright, unless the defender puts in issue the existence of the copyright or the title of the pursuer.[9] Where any such question is in issue, then (*a*) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work; (*b*) if no name is printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purpose of proceedings in respect of infringement.[9]

1123. In lieu of a claim for damages or for an account and profits, the owner of the copyright may take proceedings for the delivery up of all copies of the infringing work and all plates used or intended to be used for its production, which are in that case to be deemed to be his property.[10] Under this section of the Act the measure of damages is not confined to net profits but extends to the full value of the infringing work. Apart from this provision there is a right at common law to the delivery up of infringements, although only for destruction, or for the cancellation of the infringing parts.[1]

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[1] Macgillivray's Copyright Act, 1911, p. 73.

[2] *Ibid.*; Copinger, 6th ed., p. 167.

[3] *Mawman* v. *Tegg*, 1826, 2 Russ. 385; see also *Kelly* v. *Morris*, 1866, L.R. 1 Eq. 697.

[4] Act of 1911, s. 9.

[5] *Birn* v. *Keen*, [1918] 2 Ch. 281.

[6] Copinger, 6th ed., p. 169.

[7] *De Vitre* v. *Betts*, 1873, L.R. 6 H.L. 319.

[8] *Delfe* v. *Delamotte*, 1857, 3 K. & J. 581.

[9] Act of 1911, s. 6 (3).

[10] *Ibid.*, s. 7.

1124. The general rule is that *bona fides* is no defence to an action for infringement.[2] The Act, however, contains the following provision designed to protect a certain class of innocent infringer, viz.: where a defender alleges and proves that he was not aware, and had no reasonable ground for suspecting, that copyright subsisted in the work infringed, the pursuer is not to be entitled to any remedy other than an interdict.[3] An infringer is not within the section where he was merely under the erroneous impression that he had the authority of the owner of the copyright, but only where he proves that he was not aware of and had no reasonable grounds for suspecting the subsistence of copyright.[4] The section affords no protection against proceedings for the delivery up of infringing copies or for damages for non-delivery.[5]

1125. No action in respect of infringement of copyright is to be commenced after the expiration of three years next after the infringement.[6] As infringement consists not only in the making of an infringing work, but also in selling or offering or importing it for sale, etc., the period of three years will run from the date of each new act of infringement.

SUBSECTION (2).—*Summary Remedies.*

1126. In addition to his civil liability to the owner of the copyright, an infringer is in certain cases liable to be proceeded against criminally before a court of summary jurisdiction. Under the Act of 1911 it is an offence knowingly to deal with infringing copies of a copyright work in any of the following ways: (*a*) to make them for sale or hire; (*b*) to sell them or let them for hire or to expose or offer them for sale or hire; (*c*) to distribute them for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; (*d*) to exhibit them in public by way of trade; (*e*) to import them for sale or hire into the United Kingdom.[7] An offender is liable on conviction to a fine of 40s. for every copy dealt with, but not exceeding £50 in respect of the same transaction, and in the case of a subsequent offence either to such fine or to two months' imprisonment.[7] Any person knowingly making infringing copies, or having in his possession any plate for the purpose of making them, or knowingly and for his private profit causing a work to be performed in public without the consent of the owner of the copyright, is liable on conviction to a fine of £50, and on a subsequent conviction to such fine or to two months' imprisonment.[8] The Court before which any of the foregoing offences are tried may, whether the accused is convicted or not, order all copies or plates in his possession to be destroyed or delivered up to the owner of the copyright.[1] A conviction under the section lies only in respect of making or dealing with works which can be regarded as "infringing copies." It would seem that in order to be infringing copies within the meaning of the section they must be copies of substantially the whole work, including any colourable imitation of the whole; [2] but the term would probably comprise not only a work in the same material form, but also any work the sole right to produce which is conferred on the owner of the copyright.[3] Any person aggrieved by a summary conviction may appeal to the High Court of Justiciary by way of stated case.[4]

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[1] *Warne* v. *Seebohm*, 1888, 39 Ch. D. 73.

[2] See para. 1100, *supra*.

[3] Sec. 8. As to cases to which this section may apply, see Copinger, 6th ed., p. 173.

[4] *Byrne* v. *Statist Co.*, [1914] 1 K.B. 622.

[5] Copinger, 6th ed., p. 174; Macgillivray's Copyright Act, 1911, p. 87.

[6] Act of 1911, s. 10.

[7] *Ibid.*, s. 11 (1).

[8] *Ibid.*, s. 11 (2).

1127. The above section of the Act of 1911 is declared [5] not to affect, as regards musical works, the provisions of the Musical (Summary Proceedings) Copyright Act, 1902,[6] or of the Musical Copyright Act, 1906.[7] These two Acts, which were passed in order to deal with piracy in musical works, are accordingly left unrepealed by the Act of 1911. The Act of 1902 deals with the hawking of pirated music. Upon the application of the owner of the copyright in any musical work, a Court of summary jurisdiction, if satisfied by evidence that there is reasonable ground for believing that pirated copies of the work are being "hawked, carried about, sold, or offered for sale," may, by order, authorise a constable to seize such copies without warrant and bring them before the Court; and on proof that the copies are pirated may order them to be destroyed, or to be delivered up to the owner of the copyright if he applies for delivery.[8] If any person hawks, carries about, sells, or offers for sale any pirated copy of a musical work, every such pirated copy may be seized by any constable without warrant, on the request in writing of the apparent owner of the copyright, or of his agent thereto authorised in writing, and at the risk of such owner.[9] On seizure the copies are to be conveyed before a Court of summary jurisdiction, and on proof that they are infringements they are to be forfeited, or destroyed, or otherwise dealt with as the Court may think fit.[9] "Musical copyright" is defined as the exclusive right of the owner of such copyright under the Copyright Acts in force for the time being to do, or to authorise another person to do, all or any of the following things in respect of a musical work: (1) To make copies by writing or otherwise of such musical work; (2) to abridge it; (3) to make any new adaptation, arrangement, or setting of such musical work, or of the melody thereof, in any notation or system.[10] "Musical work" means any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced. "Pirated musical work" means any musical work written, printed, or otherwise reproduced without the consent lawfully given by the owner of the copyright.[10]

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[1] Act of 1911, s. 11 (3).

[2] Macgillivray's Copyright Act, 1911, p. 94.

[3] Act of 1911, s. 1 (2); Copinger, 6th ed., p. 184.

[4] Act of 1911, s. 12; Summary Jurisdiction (Scotland) Act, 1908, ss. 60–76.

[5] Sec. 11 (4).

[6] 2 Edw. VII. c. 15.

[7] 6 Edw. VII. c. 36.

[8] Sec. 1.

[9] Sec. 2.

[10] Sec. 3.

1128. The Act of 1902 aimed only at the seizure of pirated copies, and proved to be of little effect even for this purpose. It was held that the Court had no power to make an order for the forfeiture or destruction of copies unless the person from whom they had been seized had been notified by summons of the intention to apply for the order;[1] also, that where pirated copies were suspected to be kept in premises the Court had no power to issue a search warrant.[2] The Musical Copyright Act, 1906, was passed to remedy these defects. It provides that any person who prints, reproduces, or sells pirated music or has it in his possession for sale, or who has in his possession plates for the purpose of printing or reproducing such works shall (unless he proves that he acted innocently) be guilty of an offence punishable on summary conviction and be liable to a fine of £5 for a first offence, and for a second or subsequent offence to a fine of £10 or to imprisonment for two months.[3] If the accused has not been previously convicted of an offence under the Act and proves that the copies in respect of which the offence was committed had printed on the title page a name and address purporting to be that of the printer or publisher, he is not to be liable to a penalty, unless it was proved that the copies were to his knowledge pirated copies.[3] Any constable may take into custody without warrant any person who in any street or public place sells, or exposes, offers, or has in his possession for sale pirated copies of any such musical work as may be specified in any general written authority addressed to the "Chief officer of police," and signed by the apparent owner of the copyright in such work or his agent thereto authorised in writing, requesting the arrest, at the risk of such owner, of all persons found committing offences under the section.[4] "Chief officer of police" is in Scotland to have the same meaning as in the Police (Scotland) Act, 1890.[5] A search warrant may be granted by a Court of summary jurisdiction if satisfied by information on oath that there is reasonable ground for suspecting that an offence against the Act is being committed, and pirated copies and plates seized are to be forfeited and destroyed.[6] "Pirated copies" means any copies of any musical work written, printed, or otherwise reproduced without the consent lawfully given by the owner of the copyright. "Musical work" means a musical work in which there is subsisting copyright.[7]

1129. Summary remedies for infringement of copyright in works of art, forming an addition to those introduced by the Act of 1911, are provided by ss. 7 and 8 of the Fine Arts Copyright Act, 1862,[8] which were left unrepealed by the Act of 1911. Under s. 7 the following are made offences: (1) fraudulently signing or affixing, or causing to be signed or affixed to any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram; (2) fraudulently selling, publishing, exhibiting, or disposing of, or offering for sale, etc., a work with any such name, etc.; (3) fraudulently uttering, disposing of, or putting off, or causing to be uttered or disposed of any copy or colourable imitation of a work, whether copyright or not, as the original work; (4) knowingly selling, or publishing, or offering for sale, during the life of the author, without his consent, any work, or copies of a work, which has been altered, as the unaltered work of the author: provided that in all these cases the person whose name, initials, or monogram is fraudulently affixed, or whose work is altered, or to whom a work is falsely ascribed, is living at the time, or within twenty years of the time, of the commission of the offence. Every offender is liable on conviction to forfeit to the person aggrieved by the fraud a sum not exceeding £10, or double the full price at which the copies or altered works have been sold or offered for sale, and such copies, etc., are to be forfeited to the person whose name, etc., has been fraudulently used, or whose work has been altered, or to whom a work has been falsely ascribed.[1] Pecuniary penalties and forfeited copies, etc., may be recovered by action in the Court of Session or summary action in the Sheriff Court.[2] In the latter case the Sheriff's judgment is final.[2] Under clause (4) (*supra*) of s. 7 the act need not be done fraudulently, as in the other three clauses: it is sufficient if it be done knowingly. It is no answer to the author's claim that the alteration was made by the owner of the copyright under the *bona fide* belief that he was entitled to alter the work.[3]

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[1] *Ex parte Francis*, [1903] 1 K.B. 275.

[2] *Ex parte Francis*, 1903, 88 L.T. 806.

[3] Sec. 1 (1).

[4] Sec. 1 (2).

[5] Sec. 3 (*c*); see Police (Scotland) Act, 1890, s. 30, and Third Schedule.

[6] Sec. 2.

[7] Sec. 3.

[8] 25 & 26 Vict. c. 68.

SECTION 12.—IMPORTATION OF COPIES.

1130. The Act of 1911 makes provision against the importation into the United Kingdom of copies made out of the United Kingdom, which would infringe copyright if made within the United Kingdom.[4] Where the owner of the copyright gives notice to the Commissioners of Customs and Excise of his desire that such copies should not be imported, they are to be deemed to be included in the table of prohibitions and restrictions contained in s. 42 of the Customs Consolidation Act, 1876.[5] Under that section goods prohibited to be imported are to be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct. The Commissioners of Customs and Excise may make regulations respecting the detention and forfeiture of such copies, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for the purposes of the section.[6] The provisions of the section are to have effect as if they were part of the Customs Consolidation Act, 1876,[1] except that the Isle of Man is not for the purposes of the section to be treated as part of the United Kingdom.[2] The section is, with the necessary modifications, to apply to the importation into a British possession to which the Act extends of copies of works made out of that possession.[3]

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[1] Sec. 7.

[2] Sec. 8.

[3] *Carlton Illustrators* v. *Coleman*, [1911] 1 K.B. 771.

[4] Sec. 14.

[5] Sec. 14 (1); the Customs Consolidation Act, 1876, applies to all British possessions, except such as have by local act or ordinance made entire provision for the management and regulation of the Customs in such possessions.

[6] Sec. 14 (3). For regulations so made, see Statutory Rules and Orders, 1912, No. 1714.

As the Act contains no definition of "copies," there is some uncertainty as to what works are to be regarded as copies for the purpose of this section. It would seem that the section does not apply to works which are copies of only part of an original work or to colourable imitations, but that it includes only obvious infringements, or reproductions in the same form of substantially the whole of an original work.[4]

1131. It is to be noted that the provision against the importation of copies into the United Kingdom will apply to copies made in any of the British dominions as well as those made in a foreign country. This enables an owner of copyright who has granted a licence restricted to some part of the dominions, or even an assignation of copyright for the particular dominion, to prohibit from being imported into the United Kingdom copies made under the licence or assignation. A publisher in this country who has only obtained a licence from a colonial or foreign author would be unable to prevent copies made by the author or his agent from being imported here, as such copies would not infringe copyright if made in the United Kingdom. In order to be protected against such importation it would be necessary for the publisher here to obtain an assignation of the copyright for the United Kingdom. In the same way a mere licensee for the publication of a colonial edition would be unable to prevent copies made in this country from being imported into the colony in the absence of local legislation prohibiting the importation of such copies without the consent of the licensee. Sec. 25 (2) of the Act would enable a self-governing colony to pass legislation to that effect.

SECTION 13.—JOINT WORKS.

SUBSECTION (1).—*Generally.*

1132. A work of joint authorship is defined as meaning "a work produced by the collaboration of two or more authors, in which the contribution of one author is not distinct from the contribution of the other author or authors."[5] Such joint works differ from collective works,[6] in which the contributions of the various authors are distinguishable from one another. In the absence of agreement to the contrary, joint authors are deemed to be interested in equal shares.[7] One of them cannot grant a licence to publish without the consent of all the others;[1] but one may maintain an action for infringement in his own name, without joining the others,[2] and may restrain his co-authors from publishing the work without his consent.[3] If damages are claimed, all the joint authors should be made parties to the action so that the inquiry may be exhaustive of all claims.[4]

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[1] 39 & 40 Vict. c. 36.

[2] Sec. 14 (6).

[3] Sec. 14 (7).

[4] Macgillivray's Copyright Act, 1911, p. 108; Copinger, 6th ed., p. 180.

[5] Act of 1911, s. 16 (3).

[6] See para. 1055, *supra*.

[7] *Jones* v. *Moore*, 1841, 4 Y. & C. Ex. 351.

1133. Where some one or more of the authors do not satisfy the conditions conferring copyright laid down by the Act of 1911, the work is to be treated for the purposes of the Act as if the other author or authors had been the sole author or authors thereof.[5] This provision of the Act applies to the case of an unpublished joint work[6] of which one of the authors was at the date of the making of the work neither a British subject nor resident within a part of the British dominions to which the Act extends and is not protected under the international provisions of the Act. The British co-author is to be regarded as the sole owner of the copyright, and he alone, therefore, can sue for infringement. The foreigner would, however, be no doubt entitled to enforce his contractual rights against his British co-author.

SUBSECTION (2).—*Duration of Copyright.*[7]

1134. In the case of a work of joint authorship, copyright subsists during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer.[8] Where some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by the Act, the work is to be treated for the purposes of the Act as if the other author or authors had been the sole author or authors; except that the term of copyright is to be the same as it would have been if all the authors had satisfied such conditions.[9] This provision of the Act is intended to meet the case where one of the authors is a foreigner not resident in any part of the dominions to which the Act extends and not protected by the international provisions[10] of the Act. But it applies only to an unpublished work, as in the case of a published work the conditions conferring copyright are satisfied as regards both authors by the first publication of the work within the dominions to which the Act extends.[11] If the work has been so published, copyright will endure for fifty years after the death of the author who dies first or until the death of the author who dies last, whichever is the longer period.

1135. In the case of an unpublished work, it is necessary to distinguish between a literary, dramatic, or musical work, or an engraving, to which the special provision of the Act, about to be noted, regarding posthumous works,[1] applies, and an artistic work other than an engraving, which is not included within such special provision.[2] As regards a joint artistic work other than an engraving, copyright endures, as in the case of a published work, for fifty years from the death of the author who dies first, or until the death of the author who dies last, whichever period is the longer.[3] If one of the authors is a foreigner and the work has not been published during the lifetime of both authors, the British author is to be regarded as the owner of the copyright.[4] The rights of the foreigner, however, will be enforceable through the British author or his representatives.[5] As regards a literary, dramatic, or musical work, or an engraving, the Act specially provides that in the case of such works, in which copyright subsists at the date of the death of the author, or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright is to subsist until publication, or performance, or delivery in public, whichever may first happen, and for a term of fifty years thereafter.[6] This section of the Act applies, as regards joint works, only to the case where the work was unpublished at the date of the death of the author who dies last. If the work is published after the death of only one of the authors, the ordinary rule as to the term of copyright will apply, viz. that it runs for fifty years after the death of the author who dies first or until the death of the author who dies last, whichever period is the longer. Where in this case one of the authors is a foreigner, the British author will be regarded as the sole author for the purpose of the Act,[7] the rights of the foreign author, if he survives the British author, or those of his representatives if the British author is the survivor, being enforceable through the British author's representatives or the British author, as the case may be. If the work is published after the death of both authors, copyright is to subsist for fifty years after the date of publication, the British author, where one of the authors is a foreigner, being again deemed to be the sole author, subject to the rights of the foreign author or his representatives.

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[1] *Powell* v. *Head*, 1879, L.R. 12 Ch. D. 686.

[2] *Powell* v. *Head, supra*; *Lauri* v. *Read*, [1892] 3 Ch. 402.

[3] *Cescinsky* v. *Routledge & Sons, Ltd.*, [1916] 2 K.B. 325.

[4] *Bergmann* v. *Macmillan*, 1881, 17 Ch. D. 423.

[5] Act of 1911, s. 16 (2).

[6] *Ibid.*, s. 1 (1) (*b*).

[7] As to compulsory reproduction of joint works on payment of royalty, and compulsory licences, see Duration of Coypright, para. 1087, *supra*.

[8] Act of 1911, s. 16 (1).

[9] *Ibid.*, s. 16 (2).

[10] *Ibid.*, sec. 29.

[11] *Ibid.*, s. 1 (1) (*a*).

SECTION 14.—WORKS IN EXISTENCE BEFORE 1911 ACT.

1136. The Act of 1911 repealed all previous statutes conferring copyright protection and declared that copyright should not subsist in any work except in accordance with the provisions of the Act.[8] It was therefore essential to define the application of the Act to works which were in existence when the Act came into operation, viz. 1st July 1912. The Act accordingly provides that where any person is, immediately before the commencement of the Act, entitled to any such right in any work as is specified in the first column of the First Schedule to the Act, or to any interest in such a right, he is from that date to be entitled to the substituted right set forth in the second column of that Schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right is to subsist for the term for which it would have subsisted if the Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder.[1] According to the First Schedule to the Act, where the existing right is copyright in the case of works other than dramatic and musical works, or both copyright and performing right in the case of dramatic and musical works, the substituted right is copyright as defined by the Act; in the case of dramatic and musical works if a person has the copyright but not the performing right, he obtains copyright as defined by the Act, except the sole right to perform the work or any substantial part thereof in public, and if he has only the performing right he obtains the sole right to perform the work in public, but none of the other rights [2] comprised in copyright as defined by the Act. For the purposes of the Schedule "copyright," in the case of a work which, according to the law in force immediately before the commencement of the Act, has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work.[3] "Performing right," in the case of a work which has not been performed in public before the commencement of the Act, includes the right at common law (if any) to restrain the performance thereof in public.[3] In the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature, the substituted copyright under the Act is to be subject to any right of publishing the essay, article, or portion in a separate form [4] to which the author was entitled at the commencement of the Act, or would, but for the passing of the Act, have become entitled under s. 18 of the Copyright Act, 1842.[5]

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[1] Act of 1911, s. 17 (1).

[2] See Duration of Copyright, para. 1084, *supra*.

[3] Act of 1911, s. 16 (1), *supra*.

[4] *Ibid.*, s. 16 (2), *supra*.

[5] Copinger, 6th ed., pp. 206–7.

[6] Sec. 17 (1).

[7] Sec. 16 (2).

[8] Sec. 24 (3); s. 31.

1137. The effect of the provision that only those works [6] which were entitled to copyright on 1st July 1912, are to acquire any protection under the Act of 1911 is as follows: (1) Unpublished works, except paintings, drawings, and photographs, being entitled to protection at common law, are protected as if they had been created after the above date; (2) in the case of paintings, drawings, and photographs, the period of protection, which was for the author's life and seven years after his death, commenced from the date of making the work, whether it was published or unpublished. No unpublished painting, drawing, or photograph obtains, therefore, any protection under the Act if the period of protection under the old law had expired at the date of the commencement of the Act; (3) published works which were not entitled to statutory protection under the old law acquire no protection under the Act. Works of architecture (except plans which were protected as artistic works), choreographic works, and mechanical contrivances for reproducing sound, were not protected under the old law, and with the exception of the last named, which are specially provided for by the Act,[1] they obtain no protection unless published after the commencement of the Act; (4) published works in which copyright or performing right subsisted under the old law but had expired at the commencement of the Act obtain no protection under the Act. In literary works, including literary rights in dramatic and musical works, the term of copyright was for the life of the author and seven years after his death, or for forty-two years from the date of publication, whichever period was the longer.[2] Performing rights, which were recognised only in the case of dramatic and musical works, were protected for a similar period, viz. the life of the author and seven years after his death, or for forty-two years from the first public performance of the work.[3] As regards artistic works other than paintings, drawings, and photographs, engravings were protected for twenty-eight years from the date of publication, but there was no copyright unless the name of the proprietor and the date of publication was printed on each print;[4] and sculptures were protected for fourteen years from first publication, and for a further period of fourteen years if the author was then alive and had not assigned the copyright, but the work had to bear his name and the date of publication; (5) published works in which copyright or performing right subsisted when the Act came into force, acquire the extended term of protection under the Act, as if the Act had been in force at the time when the work was made, and also the increased measure of protection accorded by the Act, *e.g.* the exclusive right of dramatisation, making records, cinematograph films, etc.

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[1] Sec. 24 (1).

[2] For these rights see para. 1098, *supra*.

[3] First Schedule.

[4] See para. 1080, *supra*.

[5] Note to First Schedule.

[6] An exception is made in the case of records, perforated rolls, and other mechanical contrivances for reproducing sound, for which see s. 19 (8) of Act and para. 1140, *infra*.

1138. Where an author had prior to the Act assigned his copyright, the assignee became entitled to the enlarged rights given by the Act to an owner of copyright, except that in the case of musical works the right to make contrivances for mechanically reproducing the work is specially declared to belong to the author and not to the assignee.[5] On the expiration of the original term of copyright, the benefit of the extended term is to belong to the author.[6] As this provision applies only to the case where the assignation has been granted by the author, an assignation by one other than the author who was the first owner of the copyright would confer on the assignee the benefit of the extended term.[1] Where the author had the right to the extended term, the assignee became entitled at his option either (1) on giving the notice prescribed by the Act to an "assignment of the right or the grant of a similar interest therein" for the remainder of the term for such consideration as, failing agreement, might be determined by arbitration; or (2) to continue to reproduce or perform the work "in like manner as theretofore," subject to the payment, if demanded within three years after the date at which the right would have so expired, of such royalties as, failing agreement, might be determined by arbitration, or without payment of royalties where the work, the copyright in which was assigned before the Act, was incorporated in a collective work and the owner of the assigned right or interest was the proprietor of the collective work.[2]

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[1] See Note 6, p. 514.

[2] Copyright Act, 1842 (5 & 6 Vict. c. 45).

[3] Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15); Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 20 and 21.

[4] Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68).

[5] Sec. 19 (7) (*c*).

[6] Sec. 24 (1), proviso (*a*).

1139. In view of the enlarged protection granted by the Act to owners of copyright, it was necessary to safeguard from loss those who before the Act had incurred expense in connection with derivative works the making of which was at the time legally permissible, *e.g.* the dramatisation of a novel, the making of records, etc. The Act accordingly provides that where any person has before 26th July 1910 taken any action whereby he has incurred expenditure or liability in connection with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of, or with a view to, the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of the Act, have been lawful, "nothing in the section shall diminish or prejudice any rights or interest arising from or in connection with such action which are subsisting and valuable at the said date," [3] unless the person who becomes entitled to restrain the reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.[4]

Section 15.—Mechanical Contrivances.

Subsection (1).—*Control of Mechanical Reproduction.*

1140. Under the old law mechanical contrivances for reproducing music, such as perforated rolls and gramophone records, were held not to be an infringement of the copyright in the musical composition.[5] The Act of 1911 has altered the law by providing that copyright in the case of a literary, dramatic, or musical work shall include the sole right to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered.[1] The sole right to perform the work or any substantial part thereof in public being included in copyright,[2] and performance being defined as meaning any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument,[3] copyright may be infringed not only by the making of any contrivance for mechanically reproducing the work, but also by using the contrivance for the purpose of performing the work in public. Exclusive control is thus conferred on the owner of the copyright in a literary, dramatic, or musical work in regard to the mechanical reproduction of the work.

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[1] Copinger, 6th ed., p. 268.

[2] Sec. 24 (1), proviso (*a*).

[3] As to the application of words in s. 6 of the International Copyright Act, 1886, similar to those quoted, see *Moul* v. *Groenings*, [1891] 2 Q.B. 443; *Schauer* v. *Field*, [1893] 1 Ch. 35; and Copinger, 6th ed., pp. 259 *et seq.*

[4] 24 (1), proviso (*b*).

[5] *Boosey* v. *Wright*, [1899] 1 Ch. 836; [1900] 1 Ch. 122; *Monckton* v. *Gramophone Co.*, 1912, 106 L.T. 84.

SUBSECTION (2).—*Reproduction on Payment of Royalties.*

1141. In the case of musical works, however, this control is by the Act made subject to certain limitations, aimed against the granting of exclusive licences to reproduce mechanically. The owner of the copyright in a musical work is under no obligation to grant a licence for the manufacture of records or other mechanical contrivances, but if he chooses to do so the Act provides [4] that any other person may make such contrivances upon giving the prescribed notice [5] of his intention to do so and paying to the owner of the copyright royalties in respect of all contrivances sold by him. Nothing in this provision is to authorise any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made with the consent or acquiescence of the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances.[6]

1142. For the purpose of the above provision [4] a musical work is to be deemed to include any words so closely associated therewith as to form part of the same work, but is not to be deemed to include a contrivance by means of which sounds may be mechanically reproduced.[7] Words and music would appear to be so associated as to become one work only for the purpose of this royalty section and therefore only where mechanical reproduction has previously been permitted. Where such permission has not been previously granted, it is thought that it would have to be obtained in the case of a song from the author of the words as well as from the composer of the music.[8] The object of the proviso seems to be to secure that, where contrivances can be claimed to be made on a royalty basis under the section, only one royalty shall be payable, viz. to the owner of the musical copyright. But the owner of the copyright in the words of a song would be entitled to share in the royalty. The Act expressly provides [9] that where contrivances made under the section reproduce two or more different copyright works and the owners of the copyright are different persons, the royalties payable are to be apportioned amongst the several owners in such proportions as, failing agreement, may be determined by arbitration.

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[1] Sec. 1 (2) (*d*).

[2] Act of 1911, s. 1 (2).

[3] *Ibid.*, s. 35 (1).

[4] Sec. 19 (2).

[5] See para. 1144, *infra*.

[6] Sec. 19 (2), proviso (i).

[7] Sec. 19 (2), proviso (ii).

[8] Copinger, 6th ed., p. 227.

[9] Sec. 19 (4).

1143. Where contrivances by means of which a musical work may be mechanically performed have been made, the owner of the copyright is to be deemed, in relation to any person who makes the inquiries prescribed by regulations which the Board of Trade are empowered [1] to make, to have consented to the making of such contrivances if he fails to reply to the inquiries within the time prescribed by the regulations.[2] Under regulations so made,[3] the inquiries referred to are to be directed to the owner of the copyright by name, or (if his name is not known and cannot with reasonable diligence be ascertained) in general terms to "the owner of the copyright" of the musical work.[4] The inquiries are to contain: (*a*) a statement of the name of the musical work and of the author (if known) and (if necessary) a description sufficient to identify it; (*b*) a statement of the name, address, and occupation of the person making the inquiries; (*c*) an allegation that a contrivance has previously been made by means of which the musical work may be mechanically performed, with the trade name (if known) and a description of such contrivance; (*d*) an inquiry whether the contrivance was made with the consent or acquiescence of the owner of the copyright.[4] The inquiries are to be sent, if an address within the United Kingdom of the owner of the copyright is known or can with reasonable diligence be ascertained, by registered post to that address, otherwise they are to be advertised in the *London Gazette.*[5] The prescribed time for reply to the inquiries is to be, where the inquiries are required to be sent by registered post, seven days after the date when the inquiries would in ordinary course of post be delivered, and where the inquiries are to be advertised in the *London Gazette*, seven days after the date of the advertisement.[6]

1144. The consent of the owner of the copyright to the previous making of mechanical contrivances being capable of proof, a person intending to make such contrivances must give the owner of the copyright notice of his intention. This notice is to be sent by registered post to the name and address within the United Kingdom of the owner of the copyright, or his agent for the receipt of such notice, not less than ten days before any contrivances are delivered to a purchaser.[7] The notice must contain the following particulars: (*a*) the name and address of the person intending to make the contrivances; (*b*) the name of the musical work which it is intended to reproduce and of the author (if known), and (if necessary) a description sufficient to identify the musical work; (*c*) the class of contrivance on which it is intended to reproduce the musical work (*e.g.* whether discs, cylinders, or musical rolls); (*d*) the ordinary selling prices of the contrivances, and the amount of the royalty payable on each contrivance; (*e*) the earliest date at which any of the contrivances will be delivered to a purchaser; (*f*) whether any other work is to be reproduced on the same contrivance with the musical work specified in para. (*b*).[1] If the name and address within the United Kingdom of the owner of the copyright are not known and cannot with reasonable diligence be ascertained, the notice is to be advertised in the *London Gazette*, giving the particulars (*a*) and (*b*) above and stating an address from which a copy of the notice giving all the above particulars may be obtained.[2]

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[1] Sec. 19 (6).

[2] Sec. 19 (5).

[3] Mechanical (Musical Instruments) Regulations, 1912.

[4] *Ibid.*, reg. 6.

[5] *Ibid.*, reg. 7.

[6] *Ibid.*, reg. 8.

[7] *Ibid.*, reg. 3.

1145. Royalties are to be calculated (*a*) in the case of contrivances sold before 1st July 1914, at the rate of 2½ per cent., and (*b*) in the case of contrivances sold after that date, at the rate of 5 per cent. on the ordinary retail selling price of the contrivance, calculated in the manner prescribed by the regulations, but the royalty payable in respect of a contrivance is in no case to be less than a halfpenny for each musical work reproduced thereon, and where the royalty includes a fraction of a farthing, such fraction is to be reckoned as a farthing.[3] The regulations provide [4] that the ordinary retail selling price of any contrivance is to be calculated at the marked or catalogued selling price of single copies to the public, or, if there is no such marked or catalogued selling price, at the highest price at which single copies are ordinarily sold to the public. Unless otherwise agreed, royalties are to be payable by means of adhesive labels purchased from the owner of the copyright and affixed to the contrivance, or in the case of cylinders to a carton or box containing the cylinder.[5] No contrivance or box containing a cylinder is to be delivered to a purchaser without such a label.[5] The owner of the copyright is to intimate by registered letter to the person giving notice of his intention to make the contrivances a reasonably convenient place within the United Kingdom where such adhesive labels can be obtained and is to supply same on tender of the price thereof.[5] If the labels, where the royalties are so payable, are not available either because after the expiration of five days from the date of the notice the owner of the copyright has not duly sent to the person giving the notice an intimation of a reasonably convenient place within the United Kingdom where such labels can be obtained, or because the owner of the copyright refuses or neglects to supply the labels within three days after demand duly made, the contrivances may be delivered to purchasers without labels affixed to them or to the carton or box enclosing them.[6] In that case the royalties are to be a debt due to the owner of the copyright from the person making the contrivances, who is to keep an account of all contrivances sold by him.[1]

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[1] Mechanical (Musical Instruments) Regulations, 1912, reg. 2.

[2] *Ibid.*, reg. 3 (*b*).

[3] Act of 1911, s. 19 (3).

[4] Reg. 5.

[5] Reg. 4 (*a*). This regulation as to adhesive labels held *intra vires* as being one for "securing" payment of royalties under s. 19 (6); *Monckton* v. *Pathé Frères Pathephone, Ltd.*, [1914] 1 K.B. 395.

[6] Reg. 4 (*b*).

1146. In the case of musical works published before the commencement of the Act, *i.e.* 1st July 1912, the foregoing provisions of the Act conferring the right to make contrivances on payment of royalties are to apply subject to the following modifications and additions: (*a*) the conditions as to the previous making with the consent or acquiescence of the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work, are not to apply; (*b*) the rate of 2½ per cent. is to be substituted for the rate of 5 per cent. as the rate at which royalties are to be calculated, but if contrivances had been lawfully made or placed on sale within the dominions to which the Act extends before 1st July 1910, no royalties are to be payable before 1st July 1913; (*c*) notwithstanding any assignment made before the passing of the Act of the copyright in a musical work, the right to make or authorise the making of mechanical contrivances is to belong to the author or his legal personal representatives and the royalties are to be payable to them; (*d*) the saving contained in the Act of the rights and interests arising from or in connection with action taken before the commencement of the Act is not to be construed as authorising any person who has made mechanical contrivances to sell such contrivances, whether made before or after the passing of the Act, except on the terms and conditions laid down in this section.[2] In a case decided in the English Court of Appeal,[3] Buckley and Kennedy L.JJ. considered that the saving referred to in the above para. (*d*) is that contained in s. 24 (1) (*b*) of the Act,[4] notwithstanding the difference in the dates mentioned in the two enactments, viz. the commencement of the Act in para. (*d*) and 26th July 1910, in s. 24 (1) (*b*). Kennedy L.J. thought that the saving might also be regarded as that contained in the preceding paras., (*a*) and (*b*) of section 19 (7). The case raised the question whether the defendants, having lawfully made contrivances after the passing of the Act but before its commencement for the reproduction of a musical work composed and published before the Act, could sell these contrivances after the commencement of the Act without the consent of the composer and without paying royalties. It was contended that para. (*d*) of the section did not apply, and that no inference against the right to sell could be drawn from para. (*b*), which referred only to records made before 1st July 1910. It was held that, subject to the exemption in favour of contrivances made or placed on sale before 1st July 1910, from payment of royalties until 1st July 1913, no contrivance made at any time before the date of the commencement of the Act could be sold after that date without payment of royalties.

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[1] Reg. 4 (*b*). For a discussion as to whether this regulation is *intra vires*, see Copinger, 6th ed., p. 235.

[2] Sec. 19 (7).

[3] *Monckton* v. *Pathé Frères Pathephone, Ltd.*, [1914] 1 K.B. 395.

[4] See para. 1139, *supra*.

SUBSECTION (3).—*Foreign Works.*

1147. With regard to foreign works, where the Act of 1911 is extended to a foreign country as a member of the Copyright Union,[1] the copyright will generally include the sole right to make contrivances for mechanically reproducing the works. By Order in Council dated 24th June 1912, the Act was extended, subject to the modifications and conditions referred to in the Order, to the following countries as members of the Union, viz. Belgium, Denmark and the Faröe Islands, France, Germany and the German Protectorates, Hayti, Italy, Japan, Liberia, Luxembourg, Monaco, Norway, Portugal, Spain, Sweden, Switzerland, and Tunis. This Order, referred to as the principal Order, has since been applied to the following countries as new members of the Union, viz. the Netherlands, Morocco, Poland, Austria, Greece, Czechoslovakia, Bulgaria, Brazil, Hungary, French Protectorates of Syria and Lebanon, and Roumania. The principal Order provided that the provisions of the Act conferring on the owner of the copyright in a literary, dramatic, or musical work the exclusive right of making contrivances for mechanically reproducing the work and conferring copyright in such contrivances should not apply in the case of works which originated in Denmark, Italy, or Sweden. The exception has since been revoked as regards these countries respectively by Orders in Council dated 17th March 1913, 9th February 1914, and 25th November 1919.

1148. In the case of musical works first published in a foreign country before the commencement of the Act, the Act provides that where copyright is conferred on such works by Order in Council, the copyright is not to include any rights with regard to the making of mechanical contrivances except to such extent as may be provided by the Order.[2] The principal Order in Council provides that copyright in such musical works published before the commencement of the Act is to include the right to make mechanical contrivances if no such contrivances have before the commencement of the Order, *i.e.* 1st July 1912, been made or placed on sale within the parts of His Majesty's dominions to which the Order applies.[3] In the application of this article to the other countries to which the principal Order has since been extended the commencement of the Order referring to these countries is substituted for the commencement of the Act and for the commencement of the principal Order; and in the application of ss. 1 (2) (*d*) and 19 of the Act of 1911, the commencement of the Order is substituted for the commencement of the Act and for the passing of the Act in ss. 19 (7) and 19 (8).

SUBSECTION (4).—*Copyright in Mechanical Contrivances.*

1149. Before the Act of 1911, there was no copyright in mechanical contrivances themselves, and they could, therefore, be reproduced by others without the consent of the original manufacturers. The Act provides that copyright is now to subsist "in records, perforated rolls, and other such contrivances by means of which sounds may be mechanically reproduced in like manner as if such contrivances were musical works."[1] The term of copyright is to be fifty years from the making of the original plate from which the contrivance was derived.[1] The person who was the owner of the plate is to be deemed to be the author of the work, and where such person is a body corporate, the body corporate is to be deemed for the purposes of the Act to reside within the parts of His Majesty's dominions to which the Act extends if it has established a place of business within such parts.[1] The copyright thus conferred in respect of records, etc., while giving the owner of the copyright a right to restrain the making of copies of the record, will not prevent another manufacturer from making records independently by agreement with the owner of the musical copyright or under the compulsory powers of s. 19 of the Act. The copyright in the record, moreover, will be subject to the right of the owner of the musical copyright to restrain the performance of the work in public.

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[1] America is not a member of the Copyright Union. An Order in Council dated 3rd February 1915, extended the protection of the Act of 1911 to works of the classes (*b*) and (*c*) in s. 29 of the Act, but not to works first published in America; see para. 1173, *infra*.

[2] Sec. 19 (7) (*e*).

[3] Art. 3.

1150. Notwithstanding anything in the Act, where records, etc., have been made before the commencement of the Act, copyright is to subsist therein as from the commencement of the Act in like manner and for the like term as if the Act had been in force at the date of the making of the original plate from which the contrivance was derived: provided that (i) the person who, at the commencement of the Act, is the owner of the original plate is to be the first owner of the copyright; and (ii) nothing in this provision is to be construed as conferring copyright in any such contrivance, if the making thereof would have infringed copyright in some other such contrivance if this provision had been in force at the time of the making of the first mentioned contrivance.[2]

Section 16.—Colonial Copyright.

1151. The Literary Copyright Act, 1842,[3] expressly extended throughout the British dominions. The other Copyright Acts, however, were confined in their operation to the United Kingdom. The effect of the Act of 1842 was to protect throughout the dominions works first produced in the United Kingdom, but the Act was held not to confer copyright in the United Kingdom on works first published in the dominions.[4] The International Copyright Act, 1886,[5] which was passed to remedy this, provided that the Copyright Acts should apply to a literary or artistic work first produced in a British possession in like manner as they applied to a work first produced in the United Kingdom. While both literary and artistic works made in a British possession thus acquired protection in the United Kingdom, no works produced in the United Kingdom, other than literary works, had any protection in the dominions except under a local statute. All previous legislation on the subject of Colonial copyright has been repealed by the Act of 1911, which defines its application to "British possessions." [1]

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[1] Sec. 19.

[2] Act of 1911, s. 19 (8).

[3] 5 & 6 Vict. c. 45.

[4] *Routledge* v. *Low*, 1868, L.R. 3 H.L. 100.

[5] 49 & 50 Vict. c. 33.

1152. The 1911 Act distinguishes between (1) British possessions other than self-governing dominions, (2) Protectorates, including Cyprus, and (3) self-governing dominions, *i.e.* Canada, Australia, New Zealand, South Africa, and Newfoundland.[2] The provisions of the Act, except those which are expressly restricted to the United Kingdom,[3] are to extend to non-self-governing possessions.[4] The legislature of any such possession may, however, modify or add to any of the provisions of the Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they are to apply only to works the authors whereof were, at the time of the making of the works, resident in the possession, and to works first published in the possession.[5] As regards Protectorates, His Majesty may, by Order in Council, extend the Act to any territories under his protection and to Cyprus, and, on the making of the Order, the Act, subject to the provisions of the Order, is to have effect as if the territories to which it applies or Cyprus were part of the dominions to which the Act extends.[6] Under this section the Act has been extended to the following territories: Cyprus, Bechuanaland Protectorate, East Africa Protectorate, Gambia Protectorate, Gilbert and Ellice Islands Protectorate, Northern Nigeria Protectorate, Northern Territories of the Gold Coast, Nyassaland Protectorate, Northern Rhodesia, Southern Rhodesia, Sierra Leone Protectorate, Somaliland Protectorate, Southern Nigeria Protectorate, Solomon Islands Protectorate, Swaziland, Uganda Protectorate, and Weihaiwei; [7] to Palestine; [8] and to Tanganyika.[9]

1153. The Act is not to extend to self-governing dominions,[4] but such dominions may adopt one of three courses, viz. (1) adopt the Act without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies as are necessary to adapt the Act to the circumstances of the dominion; [4] (2) pass independent Acts granting to British subjects and residents in British dominions generally rights substantially identical with those conferred by the Act of 1911.[10] In this case the dominion is to be treated, while such legislation remains in force, as a dominion to which the Act extends, upon the Secretary of State certifying that the dominion has passed such legislation.[10] Such certificate may be granted although the remedies for enforcing the rights, or the restrictions on the importation of copies of works,[11] manufactured in a foreign country, differ from those under the Act; [11] (3) obtain an extension of the Act to the dominion by Order in Council on the same conditions regarding reciprocal protection as in the case of a foreign country.[1] Newfoundland [2] has adopted the Act without any modifications or additions. Australia [3] and South Africa [4] have adopted it with modifications. Canada [5] and New Zealand [6] have adopted the second course by passing independent Acts, and the certificate of the Secretary of State has been granted in respect of both dominions.

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[1] Secs. 25 to 28.

[2] Sec. 35 (1).

[3] Secs. 11 and 12 dealing with Summary Remedies.

[4] Sec. 25 (1).

[5] Sec. 27.

[6] Sec. 28.

[7] Order in Council, No. 912, 24th June 1912.

[8] *Ibid.*, No. 385, 21st March 1924.

[9] *Ibid.*, No. 521, 16th April 1924.

[10] Sec. 25 (2).

[11] See Importation of Copies, *supra*.

SECTION 17.—INTERNATIONAL COPYRIGHT—THE COPYRIGHT UNION.

SUBSECTION (1).—*Introductory.*

1154. Originally an author had no protection against the republication of his works in a foreign country. In this country international copyright was regulated until 1886 by the International Copyright Act, 1844,[7] and amending Acts. Under these Acts the Crown was empowered to grant on certain terms the benefit of the British Copyright Acts to literary or artistic works first published out of the British dominions. Numerous Orders in Council were made in pursuance of these Acts, and several European countries had treaties *inter se.* As an author's rights varied according to the particular Order in Council or treaty which applied, a conference of several of the European Powers was held in Berne in 1885 with the object of settling the complications which had arisen and of securing some degree of uniformity throughout their territories. A draft Convention was agreed to, the contracting States being constituted into a Union for the protection of the rights of authors over their literary and artistic works. The conference was then adjourned to enable the parties to obtain sanction from their respective legislatures to accede to the Convention. In this country the International Copyright Act, 1886,[8] was passed empowering the Crown to issue Orders in Council giving effect to the Convention. The conference reassembled at Berne in 1887, when the Convention, called the "Berne Convention," was signed. A British Order in Council was then issued on 28th November 1887, giving effect to the Convention as regards the contracting States, the full terms of the Convention being incorporated in a schedule to the Order.

1155. Another conference was held at Paris in 1896 when an "Additional Act" was drawn up modifying the Berne Convention. The Additional Act was ratified on 7th March 1898, and adopted by Order in Council of 8th March 1898. A further conference was held at Berlin in 1908 with the object of making a new agreement more complete and simple in character in order to give more effectual protection to an author and remove certain difficulties which had arisen in the working of the Berne Convention and the Additional Act. The Revised Berne Convention of 1908 resulted, and, with an additional Protocol agreed to on 20th March 1914, now supersedes the original Convention and Additional Act.[1] The right, however, was reserved to States who were parties to the original Convention and Additional Act to declare their desire to remain bound, as regards any specific point, by the provisions of these Conventions instead of by those of the Revised Convention.[1] Several of these States, including Great Britain, have exercised this right of election as regards certain points.[2]

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[1] Sec. 26 (3).

[2] 2 Geo. V. c. 5.

[3] Act No. 20 of 1912.

[4] Act No. 9 of 1916.

[5] Copyright Act, 1921 (11 & 12 Geo. V. c. 24), amended by Copyright Act, 1923 (13 & 14 Geo. V. c. 10).

[6] Copyright Act (No. 4), 1913.

[7] 7 & 8 Vict. c. 12; 15 & 16 Vict. c. 12; 25 & 26 Vict. c. 68; 38 & 39 Vict. c. 12.

[8] 49 & 50 Vict. c. 33.

1156. The Union thus formed, called the Copyright Union, now consists of the following countries: Austria, Belgium, Brazil, Bulgaria, Czechoslovakia, Danzig, Denmark, France and her Protectorates of Syria, Lebanon, and Algeria, Germany and her Protectorates, Great Britain and her colonies and possessions and Palestine, Greece, Hayti, Hungary, Italy, Japan, Liberia, Luxembourg, Monaco, Morocco, the Netherlands and colonies, Norway, Poland, Portugal and her colonies, Roumania, Spain and her colonies, Sweden, Switzerland, and Tunis.

SUBSECTION (2).—*Authors Protected.*

1157. Authors who are citizens of any country of the Union are to enjoy throughout all the countries of the Union the same rights as are accorded to natives in respect both of their unpublished works and of works first published by them in any country of the Union.[3] Citizens of a unionist country, who publish their works in a non-unionist country, are not entitled to protection in the Union unless the works are simultaneously published in one of the countries of the Union. Citizens of a non-unionist country, such as America, who first publish their works in a unionist country, are to have in such unionist country the same rights as native authors and in other unionist countries "the rights granted by the present Convention."[4] They are given no protection, however, for their unpublished works. In this respect the Convention differs from the British Copyright Act, 1911, under which all foreigners, without distinction, are granted copyright for their unpublished works if they are at the date of the making of the works resident within the British dominions.[5] Published works are defined as meaning "for the purposes of the present Convention, works copies of which are issued by a publisher."[6] The representation of a dramatic or dramatico-musical work, the performance of a musical work, the exhibition of a work of art, and the construction of a work of architecture are not to constitute publication.[7]

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[1] Revised Berne Convention, art. 27.

[2] For these, see Copinger, 6th ed., p. 290.

[3] Revised Berne Convention, arts. 4 and 5.

[4] *Ibid.*, art. 6.

[5] Sec. 1 (1) (*b*). If an Order in Council is made conferring full rights under s. 29 of the Act of 1911 with regard to a non-unionist country a foreigner resident in that country would obtain protection in this country for his unpublished works. The Order in Council applying the Act to America confers protection for unpublished works (see para. 1176, *infra*).

[6] Revised Berne Convention, art. 4, para. 4 ; *cf.* Act of 1911, s. 1 (3).

[7] *Ibid.* As to the effect of the definition, see Copinger, 6th ed., p. 277 *et seq.*

1158. The provision requiring that a unionist country shall accord to citizens of non-unionist countries who first publish their works in the unionist country the same rights as are accorded to native authors has been modified by an Additional Protocol dated 20th March 1914.[1] The Additional Protocol provides that, whenever any country outside the Union fails to give adequate protection to the works of citizens of any unionist country, the contracting States may impose restrictions upon the protection accorded to works whose authors, at the time when such works are first published, are citizens of such non-unionist country and are not domiciled in the Union.[2] In view of this modification of the Revised Convention it would now be possible for Great Britain, without infringing the Convention, to discriminate against any foreign non-unionist country[3] by enforcing s. 23 of the Act of 1911. Under that section the Crown is empowered, where a country does not give adequate protection to the works of British authors, to direct by Order in Council that the provisions of the Act conferring copyright on works first published in the British dominions are not to apply to works the authors whereof are citizens of such foreign country and are not resident in the British dominions.

SUBSECTION (3).—*Works Protected.*

1159. The Union is declared by the Convention to be constituted for the protection of the rights of authors over their literary and artistic works.[2] Literary and artistic works are defined as including any production in the literary, artistic, or scientific domain, whatever may be the mode or form of its reproduction, such as books, pamphlets, or other writings; dramatic or dramatico-musical works, choreographic works and pantomimes, the acting form of which is fixed in writing or otherwise; musical compositions with or without words, works of design, painting, architecture, sculpture, engraving, and lithography; illustrations, geographical charts, plans, sketches, and plastic works relative to geography, topography, architecture, or science.[4]

1160. Derivative-works are provided for as follows: Translations, adaptations, arrangements of music, and other reproductions in an altered form of a literary or artistic work, as well as collections of different works, are to be protected as original works, without prejudice to the rights of the author of the original work.[5] The contracting States are to be bound to make provisions for the protection of these works.[6] Works of art applied to industrial purposes are to be protected so far the domestic legislation of each country allows.[7] With regard to translations it is provided that the authors of unpublished works, being citizens of one of the countries of the Union,[1] and the authors of works first published in one of those countries, are to enjoy in the other countries of the Union, during the whole term of the right in the original work, the exclusive right of making or authorising a translation of their works.[2] As regards adaptations, the following are to be specially included amongst unlawful reproductions: Unauthorised indirect appropriations of a literary or artistic work, such as adaptations, musical arrangements, transformations of a novel, tale, or piece of poetry into a dramatic piece, or *vice versa*, when they are only the reproduction of that work, in the same form or in another form, without essential alterations, additions, or abridgements, and do not present the character of a new original work.[3]

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[1] For translation of Additional Protocol, see Copinger, 6th ed., p. 422.

[2] Art. 1.

[3] *E.g.* America, which requires books in the English language to be printed in America in order to be entitled to copyright.

[4] Revised Berne Convention, art. 2, para. 1.

[5] *Ibid.*, para. 2.

[6] *Ibid.*, para. 3.

[7] *Ibid.*, para. 4.

1161. Photographic works and works produced by a process analogous to photography are declared to be protected, and the contracting States are to be bound to make provision for their protection.[4]

1162. Newspaper matter is provided for as follows: (1) Serial stories, tales, and all other works, whether literary, scientific, or artistic, published in the newspapers or periodicals of one of the countries of the Union may not be reproduced in the other countries without the consent of the authors; (2) newspaper articles, except serial stories and tales, may be reproduced by another newspaper unless reproduction is expressly forbidden. The source of the article must, however, be indicated; the legal consequences of the breach of this obligation being determinable by the laws of the country where protection is claimed; (3) news of the day, or miscellaneous information which is simply of the nature of items of news, is not to be the subject of protection.[5]

1163. The original Convention provided that it should apply to all works which had not yet fallen into the public domain in their country of origin. In the Revised Convention only those works are excepted from protection which have fallen into the public domain *through the expiration of the period of protection*. The Revised Convention would therefore protect works which had ceased to be protected in the country of their origin owing to failure to comply with formalities, such as registration [6] or notice of reserve of copyright.

SUBSECTION (4).—*Duration of Copyright.*

1164. The term of copyright is to include the life of the author and fifty years after his death, but in case that term is not uniformly adopted by all the countries of the Union, the term is to be regulated by the law of the country where protection is claimed, and must not exceed the term fixed in the country of origin of the work.[7] For photographic works and works produced by a process analogous to photography, for posthumous works and anonymous or pseudonymous works, the term of protection is to be regulated by the law of the country where protection is claimed, but is not to exceed the term fixed in the country of origin of the work.[1] The country of origin of a work is to be considered to be, in the case of unpublished works, the country to which the author belongs; in the case of published works, the country of first publication; and in the case of works published simultaneously in several countries of the Union, the country the laws of which grant the shortest period of protection. In the case of works published simultaneously in a non-unionist and in a unionist country, the latter country is to be deemed the country of origin.[2]

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[1] Citizens of non-unionist countries obtain no protection for their unpublished works: see para. 1157, *supra*.

[2] Art. 8.

[3] Art. 12.

[4] Art. 3.

[5] Art. 9.

[6] Under the British Copyright Act, 1911, registration of copyright is no longer required.

[7] Art. 7, paras. 1 and 2.

SUBSECTION (5).—*Performing Rights.*

1165. The stipulations of the Convention are declared to apply to the public representation of dramatic or dramatico-musical works, and the public performance of musical works, whether published or not.[3] Authors of such works are to be protected, during the existence of their right over the original work, against the unauthorised public representation of translations of their works.[4] In order to be entitled to protection authors are not to be bound in publishing their works to reserve the right of public representation or performance.[5]

SUBSECTION (6).—*Mechanical Reproduction.*

1166. In clause 3 of the Closing Protocol of the original Berne Convention it was provided that the manufacture and sale of instruments for the mechanical reproduction of "musical airs" was not to be deemed an infringement of musical copyright. The clause was inserted in the interests of manufacturers of musical boxes—which played only airs or music without words—it being assumed that the article [6] conferring protection on "literary and artistic works" as there defined reserved to an author the exclusive right of mechanically reproducing his literary, artistic, or musical works.[7] By the Revised Convention [8] protection against mechanical reproduction is now expressly given as regards "musical works," but there is still no express provision as regards other works. The authors of musical works are to have "the exclusive right of authorising (1) the adaptation of those works to instruments which can produce them mechanically; (2) the public performance of the said works by means of these instruments." [9] Each country may impose reservations and conditions relating to the mechanical reproduction of musical works, but the effect of any such reservations, etc., is to be limited to the country which puts them in force.[10] The provisions as to mechanical reproduction are not to be applicable in any country of the Union to works which have been lawfully adapted in that country to mechanical instruments before the coming into force of the Revised Convention.[1] Adaptations made in virtue of paras. 2 and 3 of this article of the Convention, and imported without the authority of the interested parties into a country where they would not be lawful, are to be liable to seizure in that country.[2]

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[1] Art. 7, para. 3.
[2] Art. 4, para. 3.
[3] Art. 11, para. 1.
[4] *Ibid.*, para. 2.
[5] *Ibid.*, para. 3.
[6] Original Berne Convention, art. 4.

[7] In some of the countries of the Union—including this country prior to the Act of 1911, which altered the law—it was held that copyright was not infringed by the making of records, etc., while in other countries the Courts held the contrary.

[8] Art. 13.
[9] *Ibid.*, para. 1.
[10] *Ibid.*, para. 2.

SUBSECTION (7).—*Cinematographs.*

1167. Authors of literary, scientific, or artistic works are to have the exclusive right of authorising the reproduction and public representation of their works by cinematography.[3] Cinematograph productions are to be protected as literary or artistic works if, by the arrangement of the acting form or the combination of the incidents represented, the author has given the work a personal and original character.[4] Where they reproduce a literary, scientific, or artistic work, they are to be protected as original works, without prejudice to the rights of the author of the work which is reproduced.[5]

SUBSECTION (8).—*Enforcement of Protection.*

1168. The extent of an author's protection against infringement and his means of redress are both governed by the law of the country where protection is claimed.[6] The compliance with some formality, such as registration or reserve of copyright, may be a condition precedent to the grant of protection in the country of origin of the work, but in other countries of the Union the enforcement of the author's right is not to be subject to the performance of any formality and is to be independent of the existence of protection in the country of origin.[6] In proceedings for infringement authors are to be presumed, in the absence of proof to the contrary, to be entitled to institute proceedings if their name is indicated on the work in the accustomed manner.[7] In the case of anonymous or pseudonymous works, the publisher whose name is indicated on the work is to be entitled to protect the author's rights and to be deemed without other proof his legal representative.[8]

1169. Pirated works may be seized by the competent authorities of any country of the Union where the original work is entitled to protection.[9] In such a country the seizure may also apply to reproductions imported from a country where the work is not protected, or has ceased to be protected.[10] The seizure is to take place in accordance with the domestic legislation of each country.[11] These provisions are not, however, to derogate from the right of each country to permit, control, or prohibit by measures of domestic legislation or police, the circulation, representation, or exhibition of any works or productions in regard to which the competent authority may find it necessary to exercise that right.[1]

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[1] Art. 13, para. 3.
[2] *Ibid.*, para. 4.
[3] Art. 14, para. 1.
[4] *Ibid.*, para. 2.
[5] *Ibid.*, para. 3.
[6] Art. 4, para. 2.
[7] Art. 15, para. 1.
[8] *Ibid.*, para. 2.
[9] Art. 16, para. 1.
[10] *Ibid.*, para. 2.
[11] *Ibid.*, para. 3.

SUBSECTION (9).—*Protection under British Copyright Act,* 1911.

1170. Prior to the Act of 1911 the original Berne Convention and the Additional Act, having been adopted by Orders in Council under the International Copyright Acts then in force, were given full effect in this country and were interpreted by the Courts. The International Copyright Acts were repealed by the Act of 1911. Under this Act the Berne Convention is no longer the subject of interpretation in this country, the scheme of the Act being to grant rights to British works equal to those of the Convention and to make provision for the extension of those rights to foreign works. The international provisions of the Act are contained in s. 29, which enacts that His Majesty may, by Order in Council, direct that the Act (except such parts, if any, thereof as may be specified in the Order) shall apply (*a*) to works first published in a foreign country to which the Order relates; (*b*) to literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates; (*c*) in respect of residence in a foreign country to which the Order relates.

1171. The issue of such Orders is to be subject to the following conditions: (1) Before making an Order under the section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty is to be satisfied that that foreign country has made, or undertaken to make, such provisions as it appears expedient to require for the protection of works entitled to copyright under the Act; (ii) the Order may provide that the term of copyright within His Majesty's dominions shall not exceed that conferred by the law of the foreign country; (iii) the provisions of the Act as to delivery of copies of books are not to apply to works first published in such country, except so far as is provided by the Order; (iv) the Order may provide that the enjoyment of the rights conferred by the Act is to be subject to the accomplishment of such conditions and formalities as may be prescribed; (v) in applying the provision of the Act as to ownership of copyright, the Order may make such modifications as appear necessary having regard to the law of the foreign country; (vi) in applying the provisions of the Act as to existing works, the Order may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of s. 5 of the International Copyright Act, 1886.

1172. By Order in Council dated 24th June 1912,[2] the Act of 1911 was extended in respect of all the classes of work mentioned in s. 29 to the countries which were then members of the Copyright Union. This Order, called the principal Order, has been applied to countries which have since acceded to the Union. The Order limits the term of copyright within the British dominions to that conferred by the law of the country of origin of the work.[1] It provides that in the case of newspaper articles the right to prevent reproduction shall be conditional upon express prohibition in a conspicuous part of the newspaper.[2] As regards Denmark, Greece, Norway, Roumania, Sweden, or the Netherlands, this also applies to magazine articles.[3] In the case of any literary or dramatic work of which the country of origin is Greece, Italy, Japan, or the Netherlands, the right after the expiration of ten years from publication to prevent the publication of a translation is to be conditional on the publication within the British dominions or a unionist country, before the expiration of that period, of an authorised translation in the language for which protection is claimed.[4] In the case of any published musical work of which the country of origin is Japan the right to prevent performance in public is to be conditional upon express prohibition on the title page or commencement of the work.[5] As regards existing works, *i.e.* works published before the commencement of the Act, nothing in the Act of 1911 is to be construed as reviving the right to prevent the production or importation of a translation of the work where the right has ceased under s. 5 of the International Copyright Act, 1886, by virtue of non-publication in the English language; [6] in existing musical works the copyright is to include the right to make mechanical contrivances if no such contrivances have been made or placed on sale within His Majesty's dominions before the commencement of the Order, *i.e.* 1st July 1912.[7]

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[1] Art. 17.

[2] Statutory Rules and Orders, 1912, No. 913.

SECTION 18.—COPYRIGHT WITH UNITED STATES OF AMERICA.

1173. The United States are not parties to the Berne Conventions, but under the United States Copyright Act, 1909 (amended by Acts of 24th May 1912, and 28th March 1914), the President may by Proclamation confer the power of acquiring copyright in the United States on the citizens of a foreign State which grants to citizens of the United States the benefit of copyright on substantially the same terms as to its own citizens. The power was conferred on the subjects of Great Britain by Proclamation dated 9th April 1910. By Order in Council dated 3rd February 1915,[8] made under s. 29 of the Act of 1911, the provisions of that Act, including the provisions as to existing works, except the works mentioned in s. 29 (1) (*a*), are extended to American works.[1] Works first published in the United States are thus still unprotected.

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[1] Art. 2 (ii).

[2] Art. 2 (iii) (*a*).

[3] Art. 2 (iii) (*b*) as amended by subsequent Orders in Council.

[4] Art. 2 (iii) (*c*) as amended by subsequent Orders in Council. The law under the Additional Act of Paris and the International Copyright Act, 1886, is thus applied to those countries. An author has now, under the Revised Convention and the Act of 1911, the exclusive right of translation for the whole term of his copyright.

[5] Art. 2 (ii) (*d*), as amended by subsequent Order in Council.

[6] Art. 2 (iv).

[7] Art. 3.

[8] Statutory Rules and Orders, 1915, No. 130.

1174. Under the American Act the subjects of copyright are specified as (*a*) books; (*b*) periodicals, including newspapers; (*c*) lectures, sermons. and addresses; (*d*) dramatic or dramatico-musical compositions; (*e*) musical compositions; (*f*) maps; (*g*) works of art; (*h*) reproductions of works of art; (*i*) drawings or plastic works of a scientific or technical character; (*j*) photographs; (*k*) prints and pictorial illustrations;[2] (*l*) motion-picture photoplays; (*m*) motion-pictures other than photoplays.

1175. Copyright under the American Act is secured first by publication of the work in the United States with notice, consisting of the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the copyright proprietor. If the work be a printed literary, musical, or dramatic work, the notice must include also the year in which the copyright was secured by publication. In the case of works (*f*) to (*k*) above, the notice may consist of the letter C enclosed within a circle, thus: ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor; but the name of the copyright proprietor must also appear on some accessible portion of such copies, or of the margin, back, base, or pedestal.[3] In the case of a book or other printed publication the notice of copyright is to be applied upon its title page or the page immediately following, or, if a periodical, either upon the title page or upon the first page of text of each separate number, or under the title heading, or, if a musical work, either upon its title page or the first page of music.[4]

1176. After publication of the work with notice the claimant of copyright has to register his claim by depositing promptly in the Copyright Office at Washington two copies of the best edition of the work, or, if the work is by an author who is a citizen of a foreign State and has been published in a foreign country,[5] one copy of the best edition, accompanied in each case by an application for registration and a money order for one dollar registration fee.[6] The application must state the following facts: (1) The name and address of the claimant for copyright; (2) the name of the country of which the author is a citizen; (3) the title of the work; (4) the name and address of the person to whom certificate is to be sent; (5) in the case of works reproduced in copies for sale or publicly distributed, the actual date (year, month, and day) when the work was published.[7] In addition, it is desirable that the application should state for record the name of the author; if the work is published anonymously or under a pseudonym this may be omitted.[8] An action for infringement cannot be maintained unless the deposit and registration have been effected.[1] If the copies are not promptly deposited they may be demanded by the Registrar of Copyrights, and upon failure to comply with the demand within three months from any part of the United States, or within six months from any foreign country, the proprietor of the copyright will be liable to a fine and the copyright will become void.[2] As regards unpublished works, copyright at common law is reserved for them by the Act,[3] but statutory copyright may be obtained by depositing, along with application and registration fee, one typewritten or manuscript copy of the work in the case of lectures, sermons, addresses, and dramatic and musical compositions; one copy of a positive print in the case of photographs; a photograph or other identifying reproduction in the case of works of art, models or designs for works of art, or drawings or plastic works of a scientific or technical character; a title and description, with one reprint taken from each scene or act in the case of motion-picture photoplays; and a title or description with not less than two prints taken from different sections of the complete picture in the case of motion-pictures other than photoplays.[4]

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[1] See para. 1170, *supra*.

[2] Added by Act of 1912.

[3] Sec. 18.

[4] Sec. 19.

[5] *I.e.* the case of a foreign author who is claiming *ad interim* protection pending publication in the United States: see *infra*, para. 1178.

[6] Sec. 12; Regulations 22, 40, and 42.

[7] Reg. 31.

[8] Reg. 32.

1177. The Act requires, in its "manufacturing clause,"[5] that printed "books" or periodicals,[6] except the original text of books of a foreign origin in a language other than English, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of type-setting machine, or from plates made within the limits of the United States from type set therein, or if the text be reproduced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the books shall be performed within the limits of the United States. These requirements are to extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art. They are not to apply to works in raised character for the use of the blind, or to books published abroad in the English language seeking *ad interim* protection under the Act.

1178. Books first published abroad in the English language may receive interim protection pending their publication in the United States. This interim protection is obtained by depositing in the Copyright Office, not later than sixty days after publication, one complete copy of the edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the book. The protection obtained is to have the full force and effect of copyright and is to endure for four months[7] from the date of deposit.[8] If within the period of

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[1] Act of 1909, s. 12.
[2] *Ibid.*, s. 13.
[3] *Ibid.*, s. 2.
[4] *Ibid.*, s. 11; Regulations 20 to 22.
[5] Sec. 15.
[6] *I.e.* only the works specified in s. 5 (*a*) and (*b*), *supra*, para. 1174.
[7] As amended by Act of 1919.
[8] Sec. 21.

ad interim protection an authorised edition is published in the United States and the provisions of the Act as to deposit of copies, registration, etc., are complied with, the work will be entitled to the full term of copyright accorded by the Act.[1]

1179. The term of copyright provided by the Act is twenty-eight years from the date of first publication, with a right of renewal for a further period of twenty-eight years.[2] In the case of posthumous works or of composite works, such as a periodical or encyclopædia, upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the author), or by an employer for whom the work was made for hire, the proprietor of the copyright is to be entitled to the renewal. In the case of other works, including a contribution to a composite work, where such contribution has been registered, the right of renewal is to belong to the author, if still alive, or to the widow, widower, or children, or if these be dead to his executors, or, in the absence of a will, to his next-of-kin.[2] Application for renewal must be made to the Copyright Office and duly registered within one year prior to the expiration of the original term of copyright.[2]

1180. Copyright under the American Act includes the exclusive right (*a*) to print, publish, and vend the work; (*b*) to translate, dramatise, convert it into a novel or other non-dramatic work; to arrange or adapt it, if it be a musical composition; to complete, execute, and finish it if it be a model or design for a work of art: (*c*) to deliver in public for profit, if it be a lecture, sermon, or address; (*d*) to perform the work in public, if it be a drama, or if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record thereof; to make any transcription or record thereof by which it may be performed or reproduced in whole or in part; (*e*) to perform the work in public for profit if it be a musical composition, and to make any arrangement or setting of it or any form of record by which it may be read or reproduced.[3] The sole right of mechanical reproduction, however, applies only to works published after the commencement of the Act, viz. 1st July 1909, and is subject to the condition, as regards musical works, that if the owner of the copyright has permitted the work to be mechanically reproduced, any other person may so reproduce it upon paying the owner of the copyright a royalty of two cents on each record.[3] The exclusive right to make mechanical contrivances is not to belong to foreign authors or composers unless the foreign State of which they are citizens grants similar rights to citizens of the United States.[3] The right has been extended to the subjects of Great Britain, Canada, Australia, New Zealand, and South Africa.

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[1] Sec. 22.

[2] Sec. 23.

[3] Sec. 1.

CORN.

See HYPOTHEC; POINDING; THIRLAGE.

CORNICE.

See FIXTURES.

CORPORAL PUNISHMENT.

See CRIME (PUNISHMENT).

CORPORATION DUTY.

TABLE OF CONTENTS.

	PAGE		PAGE
Property subject to Duty . .	536	Administrative Provisions . .	539
Exemptions	537		

Section 1.—Property subject to Duty.

1181. Corporation duty is the familiar name for a duty imposed by the Customs and Inland Revenue Act, 1885,[1] upon property which, because vested in, or belonging to, bodies corporate or unincorporate, escapes the usual death duties. It is made leviable and payable to His Majesty in respect of all real and personal property which shall have belonged to, or been vested in, any such body during the yearly period ending 5th April 1885, or during any subsequent yearly period ending on the same day in any year. The duty is at the rate of £5 per cent., and is chargeable upon the annual value, income, or profits of such property. The deductions allowed include all necessary outgoings, the receiver's remuneration, and the costs, charges, and expenses properly incurred in the management of such property (s. 11). In the printed form of return supplied, on application to the Secretary (Stamps), Somerset House, London, by the Commissioners of Inland Revenue, deduction is allowed of ground-rent and mortgage and debenture interest, in both cases without deduction of income tax; insurance premiums, so far as the structure itself is concerned; the cost of repairs, not exceeding 10 per cent. of the annual value or rental returned for assessment; and the expenses incurred in realising the income returned for assessment. Further, it has been held in Scotland that allowance must also be given for land tax and owner's rates.[2] Where a municipal corporation created an issue of debenture stock, and in connection with the issue entered into an agreement whereby, for securing the redemption of the stock, they undertook to set aside, in the names of trustees for the debenture stockholders, a certain sum half-yearly so long as any of the stock should remain unredeemed, it was held that the equity of redemption on the fund so set aside belonged to the corporation and should be brought into account against the corporation for purposes of corporation duty.[3]

General Authority.—Jackson, Corporation Duty, 1892.

[1] 48 & 49 Vict. c. 51.

[2] *Society of Writers to the Signet* v. *Commissioners of Inland Revenue*, 1886, 14 R. 34.

[3] *Att.-Gen.* v. *Corporation of the City of London*, [1913] 2 K.B. 497.

SECTION 2.—EXEMPTIONS.

1182. Sec. 11 enacts the following exemptions:—(1) Property vested in or under the control or management of "The Commissioners of His Majesty's Works and Public Buildings," or of "The Commissioners of His Majesty's Woods, Forests, and Land Revenues," or of any Department of Government. (2) Property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large, or of any county, shire, borough, or place, or the ratepayers or inhabitants thereof, or in any manner expressly prescribed by Act of Parliament. (3) Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts. (4) Property of any friendly society or savings bank established according to Act of Parliament. (5) Property belonging to or constituting the capital of a body, corporate or unincorporate, established for any trade or business, or being the property of a body whose capital stock is so divided and held as to be liable to be charged to legacy or succession duty. (6) Property acquired by or with funds voluntarily contributed to any body, corporate or unincorporate, within a period of thirty years immediately preceding. (7) Property acquired by any body, corporate or unincorporate, within a period of thirty years immediately preceding where legacy duty or succession duty shall have been paid upon the acquisition thereof. By the interpretation clause (s. 12), the term "body unincorporate" includes every unincorporated company, fellowship, society, association, and trustee, or number of trustees, to or in whom respectively any real or personal property shall belong in such manner, or be vested upon such permanent trusts, that the same shall not be liable to legacy duty or succession duty.

1183. The charge is upon the "annual value, income, or profits" of the property, not the annual profits or gains: and, accordingly, it was held, in the case of a cricket club, that its receipts, gate-moneys and the like, arising from exhibitions, matches, etc., did not fall within those words; that "annual value" means, in the case of real property, "annual value" as under an assessment under Schedule A of the Income Tax Act, 1842, subject to the deductions allowed by the Act imposing this duty; and that "income" includes revenue arising from investments in stocks and shares.[1]

1184. The words "legally appropriated" in exemptions (2) and (3) mean that "the property is so appropriated as to create a legal obligation upon the part of the administrators of the property to apply it in a particular manner. . . . When there is a legal obligation, it follows again, as a matter of necessity, that there must be somewhere a legal right to enforce the obligation."[1] The deductions allowed under s. 11 include only yearly outgoings, and do not include capital expenditure.[2]

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[1] *In re Surrey County Cricket Club*, [1901] 2 K.B. 400.

1185. The words "charitable purpose" in exemption (3) have been the subject of decision in several cases. In the *Incorporation of Tailors in Glasgow*[3] case, a fund, created by the contributions of persons on becoming members of the corporation, was appropriated to one purpose only—that of providing for the decayed members and their widows and children. What they received, they received of right as the fruit of a payment made. The Court held that the purpose was not charitable, for charity, in the ordinary sense, means gratuitous bestowal upon one who has no right to demand anything from the giver. This view was confirmed in a subsequent case.[4] In the *Bootham Strays* case[5] it was pointed out that the words bear a more restricted meaning in this Act than in the Income Tax Act.[6] Since *Pemsel's* case the duty is not in practice charged in the case of corporations such as that of the Glasgow Tailors. The question whether the income or profits of the property belonging to a body, corporate or unincorporate, is appropriated and applied for a charitable purpose or whether the corporation is in substance a mutual benefit society is one of degree, and falls to be determined in accordance with the facts of each particular case.[7]

1186. The words "for the promotion of education, literature, science, or the fine arts," in exemption (3) have been the subject of consideration in several cases.[8] Where the property or income is, if not exclusively, yet certainly in the main, and as its chief object, devoted to the promotion of education, literature, science, or the fine arts, it will fall within the exemption. It is otherwise where the professional advancement of the corporators is the primary purpose.

1187. As to exemptions (4) and (5), see *In re Incorporated Council of Law Reporting*,[9] where it was held that the undertaking was established for a trade or business within the meaning of exemption (5), although no part of the property or income could be paid as dividend, bonus, or otherwise to any member. In practice, life assurance societies are treated as falling under this exemption.[10] The words "voluntarily contributed" in exemption (6) were considered in the cases undernoted.[11] In the sense of the Act, money "voluntarily contributed" is money gifted—gratuitously given—given not under contract—given not as condition of a benefit to be received.

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[1] *Incorporation of Tailors in Glasgow*, 1887, 14 R. 729, per L. P. Inglis; see also *In re College of Surgeons of England*, [1899] 1 Q.B. 871; *Linen and Woollen Drapers', etc. Institution*, 1887, 58 L.T. 949, per Hawkins J.; *In re the Duty on the Estate of the late Sir Thomas Gresham*, 1897, 13 T.L.R. 362.

[2] *In re the Duty on the Estate of the late Sir Thomas Gresham, supra.*

[3] *Supra.*

[4] *Linen and Woollen Drapers', etc. Institution, supra.*

[5] *In re Bootham Ward Strays, York, Inland Revenue* v. *Scott*, [1892] 2 Q.B. 152.

[6] See *Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531.

[7] *Grand Lodge of Freemasons* v. *Inland Revenue*, 1912 S.C. 1064.

[8] *Society of Writers to the Signet* v. *Commissioners of Inland Revenue*, 1886, 14 R. 34; *Forrest, In re Institution of Civil Engineers*, 1890, 15 App. Cas. 334; *In re Royal College of Surgeons*, [1899] 1 Q.B. 871.

[9] 1888, 22 Q.B.D. 279.

[10] Jackson, Corporation Duty, p. 85.

[11] *Forrest, supra*, per Lord Watson; *Society of Writers to the Signet, supra*; *In re New University Club*, 1887, 18 Q.B.D. 720.

Section 3.—Administrative Provisions.

1188. The "accountable officer" is the receiver, or possessor, or controller of the income or profits of the bodies in question (s. 12). The duty is a stamp duty, and is under the care and management of the Commissioners of Inland Revenue, who have the same powers of collection, recovery, and management as under the Succession Duty Act, 1853 (see Estate and other Death Duties), and all other powers necessary for making this duty effectual (s. 13). The duty shall be a first charge on the property while in the possession or control of the chargeable body, or of anyone acquiring the same, with notice of such duty being in arrear; and the body as well as the accountable officer is answerable for payment (s. 14). Every chargeable body shall, on or before the first day of October in every year, deliver a full and true account of its dutiable property, and of the gross annual value, income, or profits thereof in the year ended on the preceding fifth day of April, and of all deductions claimed in respect thereof, whether by relation to any of the before-mentioned exemptions or as necessary outgoings. The account shall be made in such form, and shall contain such particulars, as the Commissioners shall require, or as shall be necessary for the ascertainment of the duty; and every accountable officer shall be bound to deliver such full and true account (s. 15).[1] The accountable officer may pay the duties and all reasonable expenses out of any moneys held by him as such officer (s. 16). If dissatisfied with the account rendered, the Commissioners may cause an account to be taken by a person appointed by themselves, and may assess thereon, subject to appeal.[2] Provision is made for the expenses of such account.

1189. The duty shall be payable immediately after the assessment, notwithstanding any appeal therefrom. If the Court reduce the assessment, the difference in amount shall be repaid with such interest (if any) as the Court may allow (s. 17). A penalty of 10 per cent. on the duty found to be payable is imposed for not making returns before the first day of October; and a like penalty is incurred by wilful neglect to pay the duty for twenty-one days after it is payable, and for every month thereafter during which such neglect shall continue (s. 18). The Commissioners have the same powers as under the Succession Duty Act, 1853, in relation to the delivery and verification of accounts and the production and inspection of books and documents (s. 19 (1)). In the case of any proceedings in any Court for the administration of any dutiable property, the Court shall provide out of any such property in its possession or control for payment of the duty (s. 20).

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[1] Cp. *In re Duty on Estate of New University Club, supra,* with *In re Incorporated Council of Law Reporting, supra*; Jackson, Corporation Duty, p. 104.

[2] See para. 1190, *infra.*

1190. Every body, if dissatisfied with the assessment of the Commissioners, may avail itself of the provisions of the Succession Duty Act, 1853,[1] as to appeal (s. 19 (2)). The provision to which reference is made is contained in s. 50 of the said Act, and the procedure, in Scotland, is by petition and appeal to the Inner House of the Court of Session, sitting as the Court of Exchequer. The Court order service on the Commissioners, or on the Solicitor of Inland Revenue for Scotland on their behalf, ordaining them or him to lodge answers thereto within eight days. The procedure thereafter is the same as in an ordinary Court of Session petition; and an appeal lies to the House of Lords from the judgment of the Inner House.[2] Proceedings taken by the Crown for enforcing delivery of accounts and payment of duty are regulated by the Court of Exchequer (Scotland) Act, 1856.[3]

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[1] 16 & 17 Vict. c. 51.

[2] Jackson, Corporation Duty, p. 114.

[3] 19 & 20 Vict. c. 56.

CORPORATIONS.

TABLE OF CONTENTS.

	PAGE		PAGE
Introductory	541	Powers	544
Historical	542	Liabilities	546
Constitution of Corporations	543	Dissolution	547

SECTION 1.—INTRODUCTORY.

1191. An incorporation, or, more popularly, corporation, is a legal *persona*, formed by the union of individual persons, and continuously exercising rights and privileges for the public good. In Scotland, burghs, guildries, universities, hospitals, the Faculty of Advocates, and certain other legal bodies, the older banks, and certain of the large insurance companies, are the prominent types of the institution. In recent years bodies corporate have been created by Acts of Parliament, *e.g.* School Boards[1] (now superseded in favour of Education Authorities by the Education (Scotland) Act, 1918), County Councils,[2] and the Insurance Commissioners.[3] The growth of such institutions in Scotland has, especially in the earlier instances—municipal corporations, guildries, etc.—aspects of historical, in addition to legal, interest.[4]

1192. English law divides corporations into corporations sole and corporations aggregate. A corporation sole is a body politic, with perpetual succession, constituted in a single person.[5] The Sovereign is such a corporation, and in England certain ecclesiastical personages—a bishop, dean, parson, etc., are corporations sole. Professor G. J. Bell says that a minister of a parish in Scotland is a corporation sole; but he gives no authority.[6] A kirk-session has been expressly held not to be a corporation.[7] The heritors, minister, and kirk-session of a parish have been recognised as together forming a corporation, to certain effects, one being (at that date) the management of funds left for pious uses.[8]

1193. The distinction between incorporation and partnership lies in the public relations of the former as contrasted with the private and personal scope of the latter, and in the full personality of the one compared with the less complete personality of the other. These and other "salient points of difference" are adequately dealt with in Clark on the Law of Partnership.[1]

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[1] 35 & 36 Vict. c. 62, s. 22.

[2] 52 & 53 Vict. c. 50, s. 72.

[3] 1 & 2 Geo. V. c. 55. s. 57.

[4] See Hill Burton, History of Scotland, Ch. xvii., etc. A Sketch of the Trades House of Glasgow (1858), by George Crawford. The Edinburgh Dean of Guild Court (1896), by Robert Miller; and The Incorporated Trades of Edinburgh (1891), by James Colston.

[5] Grant on Corporations, 6, 626.

[6] Bell's Prin., s. 2176.

[7] *Kirk Session of North Berwick* v. *Sime*, 1839, 2 D. 23.

[8] *Earl of Galloway* v. *Minister, etc. of Dalry*, 22nd February 1810, F.C.; see also M'Laren, Wills and Succession, s. 1673; Mackay, Practice, i. 325.

SECTION 2.—HISTORICAL.

1194. The law of incorporation was not elaborated in the time of Stair, although the principles were fixed.[2] Erskine treats of "communities or corporations" in connection with "the doctrine of persons," and he thus begins his chapter on the subject: "A corporation, styled by the Romans *collegium* or *universitas*, is composed of a number of men united or erected by proper authority into a body-politic, to endure in continual succession, with certain rights and capacities of purchasing, suing, etc., as appear most suitable to the nature of that special community, and most necessary for answering the purposes intended by it." [3] Similarly, Professor G. J. Bell writes: "A corporation may be described as an ideal and legal person, intended to perpetuate the enjoyment of certain rights and privileges for the public benefit," [4] and again: "When a community is thus established by public authority, it has a legal existence as a person, with power to hold funds, to sue, and to defend." [5]

1195. The institution is, as Erskine indicates, of Roman origin, and civil-law terms, principles, and rules have passed over into the Scottish law of incorporation. The Roman rule, *si quid universitati debetur, singulis non debetur, nec quod universitas debet, singuli debent*, is found expressed in our law books in the very words of the Digest.[6] Feudal custom, too, has affected the constitution and law of corporations in this country, and elsewhere in Europe. The law of England, partaking in different proportions from the Scottish law of civil law and of feudal principles and rules, is not a sure guide in questions of the common law of incorporation in Scotland.[7]

The object in view in instituting or recognising corporate bodies was with the Romans, and is with us, as Professor Bell above states, and as Erskine succinctly declares, some "public permanent good." [3] This permanence or perpetuity of corporations, which arises from their relation of continued service to the successive generations of a community, is the most prominent and familiar feature in their constitutions—expressed popularly in the phrase "a corporation never dies," in words substantially adopted from Stair "an incorporation that never dies"; [2] so also Erskine, "they are for the most part formed to perpetuity and they continue always the same." [3] The nature of the object thus in view—"a public permanent good"—and the legal conception of *persona* are the fundamental matters in connection with the system and law of incorporation.

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[1] Book i. iii.

[2] Stair, Inst. ii. 3, 41.

[3] Ersk. Inst. i. vii. 64.

[4] Bell's Prin., s. 2176.

[5] Bell, Com., 7th ed., ii. 157.

[6] Digest, iii. 4, 7, s. i; *Muir et al.* v. *City of Glasgow Bank*, 1878, 6 R. 392.

[7] *University of Glasgow* v. *Faculty of Surgeons*, 1837, 15 S. 736; 1840, 1 Rob. 397.

1196. The public purposes for which, in Scotland, corporations have thus principally been created are, as has been indicated, civil government, learning and education, charity, and trade or manufacture. Corporations of the last class (commercial corporations) have, in various degrees, according to circumstances, had in their institution another element of purpose, viz. pecuniary interest; and in them a particular incident of corporation law comes into prominence, viz. the limitation of the corporators' responsibility for the common debts, which becomes even a substantive object in the creation of such corporations. This limitation is a result of the separate legal personality of corporations, in respect of which each "has its own estate and its own liabilities"[1] and the privilege, as Professor G. J. Bell states, "is nothing more than the sanction of a contract by which the company and the public deal on the credit of the stock and property of the corporation."[2]

SECTION 3.—CONSTITUTION OF CORPORATIONS.

1197. Corporations are constituted by royal charter (or letters patent) or by special Act of Parliament.[3] In the former case the privileges granted may infer incorporation, although there be no such express grant, nor the bestowal of a corporate name.[4] Where the Crown's original patent is not extant, prescriptive use of corporate rights is taken to imply its previous existence and subsequent loss or destruction. Chartered corporations, further, used to have the power of creating minor corporations within their own body by "seal of cause," as in the case of guilds and crafts in burghs.[5] But these are not independent methods of creation: the one is held to imply, and the other *ex hypothesi* implies, an original charter from the Crown. Creation by special Act of Parliament had this important characteristic, that only thus could a monopoly be created, after the power of creating monopolies had been taken from the Crown.[6] Since 1846 trade monopolies ("exclusive privileges") of guilds and similar incorporations in burghs in Scotland are altogether abolished.[7]

1198. Creation by special Act of Parliament confers the fullest corporate rights, including, unless provided otherwise, the common-law incident of limited responsibility for debt. Thus, for instance, the Bank of Scotland, a corporation created by Act of Parliament of 1695,[8] has limited liability of shareholders. But incorporation of joint stock companies, merely by registration under the general Companies Act, not by special Act of Parliament, while it confers all the other privileges of corporations, does not limit liability, unless the provisions of the statute as to limited liability are expressly adopted. (See COMPANY, where statutory incorporated trading companies are treated.)

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[1] *Muir et al.* v. *City of Glasgow Bank*, 1878, 6 R. 392, per Lord Pres. Inglis at p. 401.

[2] Bell, Com., 7th ed., ii. s. 46.

[3] Ersk. Inst. i. vii. 64.

[4] *University of Glasgow* v. *Faculty of Surgeons*, 1837, 15 S. 736; 1840, 1 Rob. 397.

[5] See *Mowat* v. *Tailors of Aberdeen*, 1825, 4 S. 53.

[6] Bell's Prin., s. 2177.

[7] 9 & 10 Vict. c. 17, s. 1.

[8] Recited in 14 Geo. III. c. 32. See Bell, Com. i. 102.

SECTION 4.—POWERS.

1199. The powers of corporations vary, according to the object and nature of each and the terms or tenor of the constitution, from, for instance, the wide and multiform powers belonging at common law and by a long series of statutes to such great municipal corporations as Edinburgh and Glasgow, down to the precise and limited powers of a trade guild, or an insurance company. The powers aftermentioned are held to belong to corporations of all classes, and, even where the charter does not expressly confer them, to be implied as *naturalia* of corporations.

1200. (1) Power to sue in the corporate name, with corresponding liability to be sued. This power follows from the legal personality of corporations. It is unnecessary, in suing, to instance the particular source and method of incorporation; but it is proper to do so. Office-bearers, or a committee or commissioner, may appear for a corporation, where duly authorised to represent the body. The appropriate manner of citing a common law corporation is to cite it by its corporate name, but a pursuer may cite it by calling its members by name as members of the corporation.[1] Citation of a corporation may take place, at common law, at a general meeting.[2] In some cases special officers are prescribed by statute as the persons upon whom service of an action against the corporation must be made, *e.g.* service of an action against a Town Council must be effected by service on the Town Clerk.[3] Where no special officer has been prescribed by statute, it has been held that service is duly made on a corporation by leaving a copy of the writ with a servant of the corporation at its proper place of business.[4] A trading corporation has its domicile at its place of business, but may have subordinate offices fixing jurisdiction and determining the local law to be applied with regard to its contracts.[5] A corporation may be cited by registered letter in terms of the Citation Amendment (Scotland) Act, 1882.[6]

1201. (2) Power to elect or admit new members, and to appoint officers for the administration of the corporate affairs. Erskine mentions three methods of carrying on the membership, recognised in charters, viz. succession to the deceased (as heirs), election by the survivors, nomination by the founder,[7] and the second of these—co-optation—is the rule, where the charter or custom fixes no other.[8] The sphere of usage with regard to a claim for admission to membership in respect of succession as a son is recognised in *Loudon* v. *Tailors of Ayr*.[8] The officers appear under different names in our historic corporations, *e.g.* deacons, wardens, magistrates, visitors, masters, managers.

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[1] *Eadie* v. *Glasgow Corporation*, 1908 S.C. 207.

[2] Mackay, Practice, i. 402.

[3] 63 & 64 Vict. c. 49, s. 9.

[4] *Glasgow Corporation* v. *Watson*, 1898, 35 S.L.R. 508.

[5] Ersk. Prin., 21st ed., 788.

[6] 45 & 46 Vict. c. 77, ss. 3 and 7. See M'Laren, Court of Session Practice, 338.

[7] Ersk. Inst. i. vii. 64.

[8] *Loudon* v. *Tailors of Ayr*, 1891, 18 R. 549, per Lord M'Laren at p. 554.

1202. (3) Power to have and use a common seal, and to hold meetings or courts of members or managers. The rule with regard to a quorum, where the constitution makes no special provision, is that a majority of the whole members is necessary.[1] When a meeting is duly constituted, the voice of the majority present is the voice of the meeting, but a majority can only bind a minority to a proceeding that is sanctioned by the constitution,[2] and in accordance with the purposes of the incorporation.[3] The right to vote, where the terms of a charter are not clear, may be affected by usage.[4]

1203. (4) Power to hold property, moveable or heritable. The corporation itself is the owner, and the members are only administrators, or trustees, for themselves and their successors.[5] As Erskine writes, "No particular member can claim any property in the goods belonging to the community." [6] A corporation's interest in property is a "partial or qualified" interest in the sense of the Lands Clauses Consolidation (Scotland) Act of 1845; and power is given under that Act to a corporation, as to a party under disability, to sell to promoters of undertakings under the Act.[7] A railway company is not a corporation within the meaning of s. 67 of the Lands Clauses Act of 1845.[8] Both the positive and the negative prescription run against corporations.[9] Special immunities have sometimes been given, by charter, to corporations with regard to the public obligations of property, *e.g.* to the University of Glasgow, exemption from taxation—a right in this case limited by usage to local taxation and the original site of the university.[10]

1204. (5) Power to act within the scope of the purposes of the institution, as fixed by charter or Act of Parliament, or as modified by usage. A majority binds a minority in matters within the limits of a corporation's powers, but any individual member or a committee has a title to prevent misapplication of the funds; and a minority, and perhaps an individual member, can sue for reduction of an illegal act.[11] In *Baird* v. *Mags. of Dundee*[12] the title of two individual burgesses to sue for sequestration of certain charitable trust funds in the hands of the defenders, and for the appointment of a judicial factor, in respect of alleged illegal use of these funds, was upheld, and in *Morrison* v. *Incor-*

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[1] *Meiklejohn* v. *Magistrates of Culross*, 1805, Mor. *voce* Burgh Royal, App. No. 17; affd. 1810, 5 Pat. 298.

[2] *Gray* v. *Smith*, 1836, 14 S. 1062.

[3] *Howden* v. *Incorporation of Goldsmiths*, 1840, 2 D. 996; *Rodgers* v. *Incorporation of Tailors of Edinburgh*, 1842, 5 D. 295.

[4] *Walker* v. *Managers of Royal Infirmary*, 1872, 45 Jur. 122.

[5] *Thomson* v. *Incorporation of Candlemakers*, 1855, 17 D. 765; *Webster* v. *Incorporation of Tailors of Ayr*, 1893, 21 R. 107.

[6] Ersk. Inst. i. vii. 64.

[7] 8 & 9 Vict. c. 19, ss. 7 and 67.

[8] *Caledonian Rly. Co.* v. *City of Glasgow Union Rly. Co.*, 1869, 7 M. 1072.

[9] Ersk. Prin., 21st ed., 552.

[10] *University of Glasgow* v. *Kirkwood*, 1872, 10 M. 1000.

[11] Mackay, Manual of Practice, 139, and cases there cited.

[12] 1865, 4 M. 69.

poration of Fleshers of Edinburgh [1] a widow of a member was held to have an interest and title to prevent the diminution of the security for an annuity to which, as widow, she was entitled.[2] The estates of an insolvent corporation are liable to notour bankruptcy and sequestration, in the case of ordinary corporations, as well as of those which carry on trade.[3] But it is incompetent to sequestrate under the Bankruptcy Acts a company registered under the Companies Acts.[4] In respect of its juristic personality, a corporation may defend its reputation and sue for damages for slander.[5] Ordinary corporations (not trading incorporations) may act as trustees, and they often do so for charitable purposes.[6]

1205. (6) Power to make by-laws and ordinances for the administration of affairs, within the limits of the purposes and constitution of the corporation. Corporations have "an implied power of making by-laws and ordinances for the good order and right administration of the stock and other affairs of the community, though such power should not be expressed in the incorporating charter." [7] By-laws duly made bind the members,[8] and ordinances duly made, in some cases, in consequence of the nature of the institution, even affect the public.[9]

SECTION 5.—LIABILITIES.

1206. The liabilities of a corporation towards its members have already been illustrated in dealing with its powers.[10] If a corporation is in neglect of a definite duty incumbent upon it by statute it would appear that performance of that duty may be enforced against it in terms of s. 91 of the Court of Session Act, 1868.[11] Towards third parties a corporation is liable in the ordinary way, upon its contracts. It is also liable *ex delicto* if the wrong complained of has been committed by its servant within the scope of his employment.[12] But a general averment that a servant of a corporation acted (when committing a wrong) within the scope of his employment will not render an action of damages relevant as against the corporation if *prima facie* it was no part of the duty of the servant to do the class of act in question.[13] Where malice is of the essence of the wrong complained of, an action of damages may nevertheless lie against a corporation, for "a corporation cannot be held to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment."[1] But an action of damages for slander against a corporation will be held irrelevant if the pursuer's averments disclose that the servant committing the wrong was actuated by personal malice.[2] A corporation as such is incapable of committing a common-law crime, because it is incapable of harbouring *mens rea*; but it may commit a statutory offence, and be prosecuted for so doing in terms of s. 28 of the Summary Jurisdiction (Scotland) Act, 1908.[3]

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[1] 1853, 16 D. 86.

[2] See also *Howden* v. *Incorporation of Goldsmiths*, 1840, 2 D. 996; *Rodgers* v. *Incorporation of Tailors of Edinburgh*, 1842, 5 D. 295.

[3] *Wotherspoon* v. *Mags. of Linlithgow*, 1863, 2 M. 348.

[4] *Standard Property Investment Co., Ltd.* v. *Dunblane Hydropathic Co., Ltd.*, 1884, 12 R. 328.

[5] *North of Scotland Banking Co.* v. *Duncan*, 1857, 19 D. 881; Glegg on Reparation, 2nd ed., 77.

[6] M'Laren, Wills and Succession, 3rd ed., ss. 1620, 1621.

[7] Ersk. Inst. i. vii. 64.

[8] *Gray* v. *Smith*, 1836, 14 S. 1062.

[9] *University of Glasgow* v. *Faculty of Physicians and Surgeons*, 1840, 1 Rob. 397, per Lord Brougham at p. 431; but see Clark on Partnership, i. 37.

[10] See para. 1200 *et seq.*, *supra*.

[11] 31 & 32 Vict. c. 100; cf. *Carlton Hotel Co.* v. *Lord Advocate*, 1921 S.C. 237.

[12] *Percy* v. *Glasgow Corporation*, 1922 S.C. (H.L.) 144.

[13] *Beaton* v. *Glasgow Corporation*, 1908 S.C. 1010; *Riddell* v. *Glasgow Corporation*, 1911 S.C. (H.L.) 35.

SECTION 6.—DISSOLUTION.

1207. Erskine writes: "Communities are dissolved either by the expiration of the time to which they are limited, if they be temporary; or 2dly, by Act of Parliament; or 3dly, by forfeiture when they abuse the powers entrusted with them";[4] and Bell adds, 4thly, "by inability to fulfil the purposes of its institution, as by insolvency of a chartered trading company."[5] Public authority of some kind or other is necessary to effect dissolution.[6] The Act 9 & 10 Vict. c. 17 (an "Act for the Abolition of the Exclusive Privilege of Trading in Burghs in Scotland") practically brought to an end the whole existing corporate guilds and crafts in Scotland as active trading or manufacturing incorporations, while it saved their existence, and provided for their reconstitution on non-monopolistic and non-trading lines, practically as benefit societies, subject to the approbation of the Court of Session.[7] Under this statute the Court cannot sanction any scheme involving the extinction of a corporation, for the statute implies the continued existence, though under altered conditions, of the class of corporate bodies referred to in its provisions.[8] But in sanctioning new by-laws for an incorporation the Court may in effect provide for its supersession in favour of a new governing body.[9] The jurisdiction of the Court in the matter is entirely statutory and does not arise from the *nobile officium*.[10]

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[1] *Citizens Life Assurance Co., Ltd.* v. *Brown*, [1904] A.C. 423.

[2] *Aiken* v. *Caledonian Rly. Co.*, 1913 S.C. 66.

[3] 8 Edw. VII. c. 65. See Renton and Brown, Criminal Procedure, 202.

[4] Ersk. Inst. i. vii. 64.

[5] Bell's Prin., s. 2179.

[6] *Thomson* v. *Incorporation of Candlemakers of Edinburgh*, 1855, 17 D. 765.

[7] See *United Incorporation of Masons and Wrights of Haddington*, 1881, 8 R. 1029.

[8] *Incorporation of Wrights, etc. of Leith*, 1856, 18 D. 981.

[9] *Incorporation of Maltmen of Stirling*, 1912 S.C. 887.

[10] *Incorporation of Tailors of Edinburgh* v. *Muir's Tr.*, 1912 S.C. 603.

CORPOREAL AND INCORPOREAL.

See HERITABLE AND MOVEABLE.

CORPSE.

See BURIAL AND CREMATION.

CORPUS DELICTI.

See CRIME.

CORPUS JURIS.

See ROMAN LAW.

CORROBORATION, BOND OF.

See BOND.

CORRUPT AND ILLEGAL PRACTICES.

See ELECTION LAW.

CORRUPTION.

See APPEAL; ARBITRATION; CRIME; ELECTION LAW.

COUNCIL AND SESSION.

See COURT OF SESSION.

COUNCIL AND SESSION, BOOKS OF.

See COURT OF SESSION; REGISTRATION.

COUNCILLOR.

See BURGHS; COUNTY COUNCIL; PARISH COUNCIL.

COUNSEL.

See ADVOCATE.

COUNSEL FOR THE POOR.

See ADVOCATE; POOR'S ROLL.

COUNT AND RECKONING.

See ACCOUNTING, ACTION OF.

COUNTER-CLAIM.

See CONTRACT; SHERIFF COURT.

COUNTY ASSOCIATIONS.

See ARMED FORCES OF THE CROWN.

COUNTY CLERK.

See COUNTY COUNCIL.

COUNTY COUNCIL.

TABLE OF CONTENTS.

- Introduction 551
- Commissioners of Supply 553
  - Historical 553
  - Powers and Duties 555
  - Qualifications 555
- Constitution of the County Council . 557
  - Composition of Council . . . 557
  - Qualification for a Councillor . 558
  - Electorate 559
- Area of Government 559
  - Area 559
  - Boundaries 559
  - Electoral Divisions . . . 560
  - Alteration of Boundaries . . 560
  - Financial Adjustments . . . 561
- Standing Joint Committee . . . 561
- Districts and District Committees . 562
  - Districts 562
  - District Committees 562
- Special Districts 564
  - Statutory Provisions 564
  - Special Drainage and Water Supply Districts 564
  - Special Lighting Districts . . 565
  - Special Scavenging, etc. Districts . 566
  - Additional Powers Available in Special Districts 566
  - Local Sub-Committees 566
  - Financial Provisions affecting Special Districts 566
- Police Districts 567
- Joint Committees 567
  - Composition 567
  - Costs 568
  - Proceedings and Powers . . . 568
- Officers 569
  - Officers of Former Authorities . 569
  - Appointment and Dismissal . . 569
  - County Clerk 569
  - Assessor 570
- Officers (*continued*)—
  - Medical Officer and Sanitary Inspector 570
  - Returning Officer 570
- Proceedings 570
  - Meetings 570
  - Convener and Vice-Convener . 571
  - Disqualification from Voting . 571
  - Committees 571
- Finance 573
  - The County Fund 573
  - Revenue 573
  - Expenditure 573
  - Budget 574
  - Rates 574
  - Rating in Burghs 576
  - Borrowing 576
  - Accounts and Audit . . . 578
- Powers and Duties 578
  - General Classification . . . 578
  - Powers and Duties transferred from Commissioners of Supply . 579
  - Powers and Duties transferred from County Road Trustees . . 580
  - Powers and Duties transferred from Local Authorities under the Contagious Diseases (Animals) Acts 580
  - Powers and Duties in Relation to Public Health 581
  - Powers and Duties transferred from Justices of the Peace . . 581
  - Further Powers 582
    - Powers as to Parliamentary Bills 582
    - Powers to make By-laws . . 582
    - Miscellaneous Powers . . . 583
    - Transfer of Powers by Secretary for Scotland 583
    - Powers in Relation to Parish Councils 583
    - Miscellaneous Duties . . . 584

SECTION 1.—INTRODUCTION.

1208. The county council as it exists in Scotland to-day is largely the creation of the Local Government (Scotland) Act, 1889,[1] which followed the model of the English Act of the preceding year,[2] and had for its object the establishment in each county of a popularly elected authority to which should be entrusted "the management of the administrative and financial business" of the area committed to its charge. County areas present widely diverse characteristics, varying as they do from the highly industrialised centre which is almost ripe for burghal government, to the undeveloped and sparsely populated rural district which has no need for any but the most elementary of communal services. The problem before the Legislature has been to construct a local authority and an administrative scheme adapted to the complicated task of governing such an area, and simultaneously to secure adequate centralisation of control, equitable incidence of local taxation, and the maintenance of local initiative. A successful solution of the problem has been found in the progressive development of the system inaugurated in 1889, in consistent adherence to a policy which has been characterised by two features, viz.: (*a*) the combination of central financial control with carefully graded devolution of executive functions in relation to purely local services, and (*b*) the imposition upon each district in the area of the cost of the special services which that district enjoys.

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[1] 52 & 53 Vict. c. 50.

[2] 51 & 52 Vict. c. 41.

1209. The general scheme which has evolved from the Act of 1889 [1] and the subsequent Acts of 1894 [2] and 1908 [3] may be briefly summarised as follows: The county council (subject in certain matters to the standing joint-committee) exercises supreme control over the general policy and finances of the county and administers those services which are common to the entire area, such as police, fire prevention, and the operation of the Contagious Diseases of Animals Acts. The first stage in devolution is to the district committee, which includes, in addition to the county councillors elected for the particular area, representatives of the local parish and town councils, and to which is committed such important services as public health and road maintenance. The final stage in devolution arises in relation to small, compact, and often isolated areas requiring special services of a purely local character, such as lighting, drainage, or scavenging. These needs are met by the creation of special districts, administered by local sub-committees of management acting under the general regulation of the district committee, and the cost of the special services is borne by assessments confined within the limits of the special district. A typical large county may consist of three districts and one hundred to one hundred and fifty special districts; but the complexity to be expected from so high a degree of sub-division has created no difficulties in practice, the success of the scheme being evidenced by the fact that the demand for the formation of new burghs has for long practically disappeared.

1210. For many years the practice of Parliament in Scottish administrative legislation has been to confer upon county authorities precisely similar powers to those conferred upon town councils, with the result that at the present time there are only three services within the competence of a town council which a county council is unable to provide, viz.: (1) Licensing of Theatres and Music Halls; (2) Provision of Public Libraries and Public Parks; and (3) Provision of Public Halls. In regard to the first of these matters, the County Justices possess adequate powers ; while the control of the second is entrusted in counties to the parish council. In the result it may safely be affirmed that the Scottish county council now enjoys practically all the powers and privileges of a burgh authority, with the important advantage that the county council may exercise its various powers only in those portions of its area in which the need arises, and to the extent to which the different services are required, and can thus effect a precise adjustment between local services, local taxation, and local needs. In considering English statutes and decisions, it is important to keep in view that development of rural government in England has proceeded along different lines, and that the English county council possesses much narrower powers than its Scottish counterpart.[1]

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[1] 52 & 53 Vict. c. 50. [2] 57 & 58 Vict. c. 58. [3] 8 Edw. VII. c. 62.

SECTION 2.—COMMISSIONERS OF SUPPLY.

1211. Before proceeding to an examination of the new authority created in 1889, it may be useful briefly to examine the system which the Act of 1889 superseded. Section 11 of the Act of 1889 provided for the transfer to the county council of (1) the whole powers and duties of the County Road Trustees, the County Local Authority under the Contagious Diseases (Animals) Acts, and the Destructive Insects Act, 1877, and the County Local Authority under the Public Health Acts; (2) the whole powers and duties (with certain limited exceptions) of the Commissioners of Supply; and (3) specified administrative powers and duties of the County Justices of the Peace. The only one of the superseded authorities requiring consideration here is the Commissioners of Supply.

SUBSECTION (1).—*Historical.*

1212. Commissioners of Supply owe their existence entirely to statute. They were appointed by Parliament in annual Acts of Supply to levy the land tax within the county to which they belonged. Erskine says that, "By two Acts of the Usurper's Parliament, holden at Westminster, 1656, c. 14 and 25, imposing taxations upon Scotland, the rates upon the several shires are precisely fixed, and the equal assessment of those rates among the individual landowners in every shire is left to the adjustment of Commissioners."[2] During the latter part of the reign of Charles II., a new and different mode was introduced for levying the large sums that were imposed upon the owners of land. Monthly assessments were laid on, and, in order to render the burden equal, new valuations were made by Commissioners appointed for that end, who were ordered to inquire into the just and true worth of every person's rent.[1] The Act of Convention, 1667, providing supply, ratified by 1670, c. 3, appointed Commissioners, and thereafter in each successive Act granting supply a special body of Commissioners was appointed to carry the Act into effect. They had power to levy the land tax, and under the Act 1681, c. 3, and 1698, c. 10, might quarter soldiers on defaulters, according to the amount of the deficiency. Prior to 1798, Commissioners were specially named for each county in the annual Acts of Supply; but the land tax being made perpetual in that year, the Commissioners of the previous year remained in office, additions being made to their numbers in each county from time to time to supply vacancies. Commissioners met at the head burgh of their several counties on a certain day named in each Act, and they were empowered to appoint the subsequent diets of their meeting, and to name conveners from time to time. The old qualification of Commissioners (with the exception of official persons) was property, superiority, or liferent of lands to the extent of £100 Scots (£8, 6s. 8d.) valued rent.

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[1] For an exhaustive description of the working of county government in Scotland, see the Proceedings before the Select Committee of the House of Commons in the Glasgow Boundaries Bill, 1925.

[2] Ersk. ii. v. 35.

1213. Originally the powers and duties of Commissioners were confined to assessing or levying the land tax, but during the two centuries which have elapsed since 1667 various additional duties and functions came to be imposed upon them. Thus by the Act of 1686 they were authorised to act with the justices of peace in maintaining the bridges and ferries within their counties, and their duties in these matters continued until they were transferred under the General Turnpike Act, 1831. Commissioners of Supply had also the appointment of parochial schoolmasters where the heritors of any parish failed to make an election.[2] This power was taken away in 1872 by 35 & 36 Vict. c. 62. The appointment of the Collector of the Land Tax lay with the Commissioners until it became vested in the Treasury by 5 & 6 Will. IV. c. 64. Previous to the Local Government Act, 1889, they had, in addition to apportioning and settling the land tax, the following duties and functions to perform: (*a*) Managing the general county expenditure, and levying assessments for it and a number of other purposes;[3] (*b*) managing the county police (through a committee);[4] (*c*) acting (through a committee) as judges of appeal under the Valuation Statutes;[5] (*d*) dealing (through a committee) with claims for admission to their own body, but subject to an appeal to the Court of Session; (*e*) carrying out the provisions of the statutes relating to the registration of parliamentary voters,[6] lunacy,[1] prisons,[2] sale of food and drugs,[3] militia,[4] reformatories and industrial schools,[5] and Sheriff Court-Houses.[6]

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[1] Wight on Elections, 193.

[2] 1696, c. 26; 43 Geo. III. c. 84.

[3] 31 & 32 Vict. c. 82, ss. 2, 3, and 10.

[4] 20 & 21 Vict. c. 72.

[5] 17 & 18 Vict. c. 91; 20 & 21 Vict. c. 58; 30 & 31 Vict. c. 80; 42 & 43 Vict. c. 42; 48 & 49 Vict. c. 3, s. 9, subs. (4) and (6); 48 & 49 Vict. c. 16; 49 & 50 Vict. c. 15; 50 & 51 Vict. c. 51.

[6] 24 & 25 Vict. c. 83; 48 & 49 Vict. c. 16.

SUBSECTION (2).—*Powers and Duties.*

1214. The powers and duties still left to the Commissioners are: (*a*) the election of their own convener;[7] (*b*) a share in the control of the police administration and the borrowing and capital expenditure of the county, by the election of representatives to the standing joint-committee;[8] (*c*) adjudication on claims for admission to their own body under the provisions of 19 and 20 Vict. c. 93, and 20 Vict. c. 11;[7] (*d*) their power as Commissioners of the Land Tax.[9] The Commissioners of Supply meet annually, in the same place and on the same day as the meeting of the county council, in the month of May in each year, for the purpose of appointing members of the standing joint-committee; disposing of claims and objections under the provisions of the Commissioners of Supply (Scotland) Act, 1856, and its amending Act, 20 Vict. c. 11; and for the purpose of electing a convener: but at this meeting the Commissioners are not permitted to transact any other business.[10] The Commissioners at this meeting appoint certain of their number, not exceeding seven, to sit upon the standing joint-committee of the county council. The standing joint-committee consists "of such number of county councillors, not exceeding seven, as shall be appointed by the county council annually at their meeting in the month of May, and such number of Commissioners of Supply, not exceeding seven, as shall be appointed by the Commissioners of Supply annually at their meeting on the same day."[11] The standing joint-committee act as the police committee of the county under the Police Act, 1857, and their consent is required to capital expenditure in regard to works,and in regard to borrowing.[12] If any Commissioner of Supply serving upon the standing joint-committee dies, resigns, or becomes disqualified, the vacancy so caused may be filled up by the Commissioners of Supply, at a meeting called by their convener on not less than ten days' notice by circular addressed to each Commissioner of Supply.[13]

SUBSECTION (3).—*Qualifications.*

1215. The qualification for Commissioners of Supply was fixed by the Valuation Act, 1854,[14] as follows: "The being named an *ex officio* Commissioner of Supply in any Act of Supply, or the being proprietor or the husband of any proprietor infeft in liferent, or in fee not burdened with a liferent, in lands and heritages within the county of the yearly rent or value, in terms of this Act, of at least £100, or the being eldest son and heir-apparent of a proprietor infeft in fee not burdened with a liferent in lands and heritages within such county of the yearly rent or value, in terms of this Act, of £400; and the factor of any proprietor or proprietors infeft either in liferent or in fee unburdened as aforesaid, in lands and heritages within such county, of the yearly rent or value, in terms of this Act, of £800, shall be qualified to act as Commissioner of Supply in the absence of such proprietor or proprietors; provided always that, with reference only to the qualification of Commissioners of Supply under this Act, the yearly rent or value of houses and other buildings, not being farmhouses or offices or other agricultural buildings, shall be estimated at only one-half of their actual yearly rent or value in terms of this Act." By the Commissioners of Supply Acts of 1856 and 1857,[1] all persons, being males and of full age, possessing the qualifications above set forth, otherwise than by nomination *ex officio* are Commissioners while so qualified. The last completed Valuation Roll of the county is *prima facie* evidence of ownership and conclusive evidence of the value. A parish minister possessing as part of his benefice a glebe worth £100 a year is not qualified, not being "infeft in liferent or in fee."[2] A factor is not merely one who holds a mandate to attend certain meetings.[3] A factor for two proprietors whose joint rental exceeded £800, the separate rentals being less, was held disqualified.[3] A factor for trustees infeft in lands and heritages of the required amount was held qualified.[4] A person entered more than once on the roll, as proprietor and as factor, or as factor for more than one proprietor, is only entitled to one vote, though one or all of his constituents are absent, since the Acts give only a qualification, not a right of voting by proxy.[5] The husband of a lady who was heritable creditor in possession of certain subjects under a decree of maills and duties was held not to possess the requisite qualification.[6] Commissioners *ex officiis* do not require the qualifications.

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[1] 20 & 21 Vict. c. 71; 25 & 26 Vict. c. 54; 40 & 41 Vict. c. 53, s. 61; 50 & 51 Vict. c. 39.

[2] 40 & 41 Vict. c. 53.

[3] 38 & 39 Vict. c. 63; 50 & 51 Vict. c. 29.

[4] 17 & 18 Vict. c. 106; 23 & 24 Vict. c. 94; 35 & 36 Vict. c. 68.

[5] 40 & 41 Vict. c. 53, ss. 6 and 7; 48 & 49 Vict. c. 61.

[6] 23 & 24 Vict. c. 79; 47 & 48 Vict. c. 102.

[7] 52 & 53 Vict. c. 50, s. 12.

[8] Sec. 18.

[9] Sec. 102.

[10] Sec. 12 (2).

[11] Sec. 18.

[12] Secs. 18 (6) and 67.

[13] Sec. 12 (3).

[14] 17 & 18 Vict. c. 91, s. 19.

1216. The Clerk of Supply (the county clerk) must keep open for inspection, till 30th October in each year, a list of all such claims to be put on the Commission as have been given in to him before the 20th of the same month, and objections thereto on the part of any Commissioners must be notified in writing both to the clerk and the claimant within ten days of the first-mentioned date; and the clerk must give ten days' notice to both claimant and objector of the time (not later than 20th Nov.) and place where a committee, appointed as after stated, meet to dispose of such claims, which must be done before 20th December in each year,[1] so that a list of the Commissioners, corrected to date and open to inspection, may be drawn up as conclusive evidence of their title to act and vote.[2] The Commissioners at their annual meeting appoint a committee, of which the quorum is three, to dispose of such claims and objections.[2] A summary appeal from the committee lies to the Lord Ordinary on the Bills, whose judgment is final.[2] Commissioners of Supply require to take the oath of allegiance.[3]

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[1] 19 & 20 Vict. c. 93; 20 Vict. c. 11.
[2] *Leslie* v. *Orkney Commrs.*, 1883, 20 S.L.R. 362.
[3] *Walker* v. *Zetland Commrs.*, 1870, 8 M. 443.
[4] *Boyd* v. *Lanarkshire Commrs.*, 1876, 14 S.L.R. 489.
[5] *Craigie* v. *Aberdeenshire Commrs.*, 1879, 7 R. 53.
[6] *Stark* v. *Dumbartonshire Commrs.*, 1885, 22 S.L.R. 599.

SECTION 3.—CONSTITUTION OF THE COUNTY COUNCIL.

SUBSECTION (1).—*Composition of Council.*

1217. The central authority constituted in each county is the county council. This body has the control of all the local business with which the Local Government Act, 1889,[4] professes to deal. The county council is a body corporate with perpetual succession and a common seal. It may sue and be sued, and may purchase, hold, and sell land and other properties. All deeds must be sealed and signed by two members and the county clerk.[5] A county council is popularly elected and is composed of two classes of representatives, viz.:—

1. County representatives, who sit for electoral divisions of the county. Police burghs are included in the county for election purposes, and form one or more electoral divisions,[6] and

2. Burgh representatives, who are elected by the burghs within the county, which have been brought under the Act, for certain purposes.

Those members who represent the county proper are chosen directly by popular vote, while the members who represent the burghs entitled to be represented are chosen by the town councils of their respective burghs from among their own number, and thus are indirectly elected by popular vote. A county council remains in office for three years. The whole number of councillors go out of office, and a new election takes place on the first Tuesday in December in every third year.[7]

1218. The number of councillors, in the case of each county, is fixed by the Secretary for Scotland, regard being paid to population, area, and the annual value as appearing in the Valuation Roll. The Secretary for Scotland also apportions the councillors allotted to each county between the county proper and the burghs which are entitled to be represented on the county council.[8] The Secretary for Scotland may, on a representation made to him, alter the number of councillors and their apportionment between the county proper and burghs.[9]

The qualification necessary for being elected a county councillor for an electoral division of a county is being registered as a county elector.[1]

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[1] 19 & 20 Vict. c. 93, s. 4, and 20 Vict. c. 11.

[2] 19 & 20 Vict. c. 93, s. 5.

[3] 34 & 35 Vict. c. 48. With regard to Commissioners of Supply generally, *vide* Bell's Prin., ss. 1127–9; Ersk., Inst. i. iv. 31; Chisholm, Justice of the Peace Digest; Rankine, Land-Ownership, 197; and Wight on Elections, 193.

[4] 52 & 53 Vict. c. 50.

[5] Sec. 72.

[6] Sec. 4 (2).

[7] Secs. 4 and 30 (i).

[8] Sec. 5.

[9] Sec. 51.

The number of burgh representatives is fixed by the Secretary for Scotland.[2] The county councillors are elected by the town council from among their number in the month of November. The elected councillors hold office for three years, and any casual vacancies are filled up by the town council.[3]

1219. The burghs which return representatives, and the purposes for which they send representatives, are (*a*) burghs (royal and parliamentary) which contain less than 7000 inhabitants, for

1. Police administration, and
2. The administration of the Contagious Diseases (Animals) Acts.

(*b*) Royal burghs which contain a population of more than 7000, but do not return, or contribute to return, a member to Parliament, for

The Contagious Diseases (Animals) Acts, and

(*c*) Royal and parliamentary burghs, whatever the population, which do not maintain a separate police force, for

The administration of the police.

It must be noted that the county councillors elected to represent these burghs cannot act or vote in respect of any matters involving expenditure to which such burghs do not contribute, or for which they are not assessed.[4]

Subsection (2).—*Qualification for a Councillor.*

1220. The persons entitled to be elected as county councillors are (*a*) any elector in the county not subject to any of the disqualifications aftermentioned, and (*b*) any person of either sex of full age and not subject to any legal incapacity, who has resided in the county during the whole of the twelve months preceding the election.[5] An adjudged bankrupt is disqualified under the Bankruptcies, Frauds, and Disabilities (Scotland) Act, 1884.[6] Any person is disqualified as a county councillor while he—

1. Holds any office or place of profit under the county council, or any committee thereof.
2. Has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council or committee.

But a person is not disqualified by reason of having any share or interest in

1. Any lease, sale, or purchase of land, or any agreement for the same.
2. Any agreement for the loan of money, or any security for the payment of money only.
3. Any newspaper in which any advertisement relating to the affairs of the council or committee is inserted.

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[1] 52 & 53 Vict. c. 50 s. 7.
[2] Sec. 5.
[3] Sec. 8 (1) and (2).
[4] Sec. 73 (8).
[5] 4 & 5 Geo. V. c. 39.
[6] 47 & 48 Vict. c. 16, s. 5.

4. Any company which contracts with the council or committee for lighting or supplying with water, or insuring against fire, any property of the council or committee.
5. Any railway company, or any company incorporated by Act of Parliament, or Royal Charter, or under the Companies Act, 1862.[1] Army officers are not disqualified.[2]

SUBSECTION (3).—*Electorate.*

1221. The electorate of a county council consists of all persons registered as county electors in accordance with the provisions of the Representation of the People Act, 1918.[3] (See ELECTION LAW). Election procedure is dealt with in the Act of 1889, s. 30,[4] the Act of 1894, s. 16,[5] the Town Councils Act, 1900, s. 55,[6] and the Act of 1908, s. 9.[7] Provision is also made in the Act of 1889 for casual vacancies,[8] double returns,[9] and the failure to elect a sufficient number of councillors.[10]

SECTION 4.—AREA OF GOVERNMENT.

SUBSECTION (1).—*Area.*

1222. For the purpose of the Local Government Act, 1889,[4] the area of local government comprises—

1. The county proper, including therein—

(*a*) Police burghs under 7000—for the purposes of the administration of police and the Contagious Diseases (Animals) Acts;

(*b*) Police burghs of, or over, 7000—for the purposes of the management and maintenance of roads unless this duty has been assumed by the Town Council.[11]

2. (*a*) Other burghs under 7000—for police administration and the administration of Contagious Diseases (Animals) Acts; as also

(*b*) Such royal burghs over 7000 as do not return or contribute to return a burgh member to Parliament—for administration of Contagious Diseases (Animals) Acts; as also

3. (*a*) All burghs which do not maintain a separate police force—for administration of police, and

(*b*) Such burghs under 10,000 as have devolved road management on the County Council—for the purposes of road administration.[12]

SUBSECTION (2).—*Boundaries.*

(i) *County.*

1223. By s. 44 of the Local Government Act, 1889, and for the purposes of that Act, counties were to have the same boundaries and contents as under the Roads and Bridges Act, 1878. A county is defined in that Act as "the county exclusive of any burgh wholly or partially situate therein, and shall not include a county of a city." Detached portions of a county situated in another county were under that Act considered as part of the county with which they have the longest common boundary. The Boundary Commissioners appointed under the Local Government Act were directed by s. 49 of the Act to deal with detached portions of a county, and the question has now been definitely settled, and the section was partly repealed in 1908.[1] The only detached portions of a county now existing are the parishes of Cumbernauld and Kirkintilloch, which, for the purposes of the Act, are held to be in the county of Dumbarton.[2]

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[1] 52 & 53 Vict. c. 50, s. 9.

[2] 54 & 55 Vict. c. 5, s. 8.

[3] 7 & 8 Geo. V. c. 64.

[4] 52 & 53 Vict. c. 50.

[5] 57 & 58 Vict. c. 58.

[6] 63 & 64 Vict. c. 49.

[7] 8 Edw. VII. c. 62.

[8] 52 & 53 Vict. c. 50, s. 33.

[9] Sec. 34.

[10] Sec. 36.

[11] 54 & 55 Vict. c. 32, s. 2.

[12] 41 & 42 Vict. c. 51, s. 47.

(ii) *Burgh.*

1224. The boundaries of a burgh for the purposes of the Act are the boundaries as fixed for police purposes under any general or local Act of Parliament, or, when no police assessment is levied, as they are fixed for municipal purposes.[3]

SUBSECTION (3).—*Electoral Divisions.*

1225. A county is divided into electoral divisions, each returning a councillor to the county council.[4] A police burgh either constitutes one electoral division or is divided into two or more electoral divisions; and no area beyond the police boundaries can be united with it in the same electoral division.[5] Electoral divisions might consist of a part of a parish, of parts of two or more parishes, of one parish and a part or parts of another parish or parishes, or of a part of a police burgh. Two or more parishes might be grouped into an electoral division, but two police burghs, or a police burgh and a parish, or part of a parish, or parts of two districts formed under s. 77 of the Act for highways or public health, could not be combined to form an electoral division.[6] A county councillor can only vote on matters for which his electoral division is liable to be assessed,[7] and this provision as to voting would be unworkable if his electoral division comprised areas which were differently rated. Electoral divisions were formed as far as possible approximately equal, having regard to valuation, area, and population, and the proper representation of the burghs in the county.[6]

SUBSECTION (4).—*Alteration of Boundaries.*

1226. On the representation of a county council, or of a town council, the Secretary for Scotland may make a Provisional Order, which requires the confirmation of Parliament, providing for the alteration of the contents and boundaries of electoral divisions. Power is also given to alter the boundaries of a county, burgh, or parish in a county, and to simplify their areas, and generally to make arrangements consequential on any alterations made.[1] Before making any Provisional Order, advertisement must be made for two successive weeks in a local paper and in the *Edinburgh Gazette*, and objections to the proposed Order must be considered; and if necessary, a local inquiry is to be taken, after due advertisement, at which parties are heard.[2] A Provisional Order is submitted to Parliament for confirmation; and if, while the Bill confirming is pending in either House, a petition is presented against any Order therein, the Bill may be sent to a select committee, and the petitioner is allowed to appear and oppose.[3] The making of a Provisional Order is *prima facie* evidence that all the requirements of the Act in respect of proceedings required to be taken before the making of the Order have been complied with.[4]

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[1] 8 Edw. VII. c. 49. The orders by the Boundary Commissioners will be found in the Councillor's Manual, A 79.

[2] 52 & 53 Vict. c. 50, s. 40.

[3] Sec. 44 (6).

[4] Sec. 4.

[5] Sec. 4 (2).

[6] Sec. 47 (1), repealed by 8 Edw. VII. c. 49.

[7] Sec. 73 (8).

SUBSECTION (5).—*Financial Adjustments.*

1227. Questions of great difficulty frequently arise in regard to the adjustment of property, debts, and liabilities following upon an alteration of boundaries. The leading statutory provisions are ss. 50 and 51 of the Act of 1889 and the Local Government (Adjustments) (Scotland) Act, 1914,[5] a measure which is still the subject of great criticism. The principles by reference to which such adjustments are effected are illustrated and explained in the undernoted cases.[6] In cases where a county area is encroached upon by an extension of burgh boundaries effected by Private Bill or Provisional Order, the financial adjustments are usually settled by a parliamentary compromise or specifically dealt with as part of the measure.

SECTION 5.—STANDING JOINT COMMITTEE.

1228. In addition to the county council, and as part of the machinery for transacting the business of a county, there are two other authorities: the "standing joint committee" and the various "district committees" of the county. These are mixed bodies, being composed only partly of county councillors, and being only to that extent popularly elected.

1229. Under the Act of 1889, the standing joint committee is charged with important duties.[1] (1) It is "deemed to be the Police Committee under the Police Act, 1857"; [2] having all the powers of such Police Committee, and being subject to all the provisions of the Police Act, except in so far as these are expressly modified by the Local Government Act. (2) No works involving capital expenditure can be undertaken in any county or district thereof, in virtue of powers transferred or conferred by the Act or any other Act, without the consent in writing of the standing joint committee. Such works include the erection, rebuilding or enlargement of buildings, the construction, reconstruction, or widening of roads and bridges, the construction or extension of drainage or water supply works, and also include the acquisition of land for the purposes of any capital work.[3]

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[1] 52 & 53 Vict. c. 50, s. 51.

[2] Secs. 91 and 93.

[3] Sec. 91 (4).

[4] Sec. 91 (6).

[5] 4 & 5 Geo. V. c. 74.

[6] *Caterham Urban Council* v. *Godstone Rural Council*, [1904] A.C. 171; *West Hartlepool Corporation* v. *Durham County Council*, [1907] A.C. 246; *Midlothian County Council* v. *Musselburgh Mags.*, 1911 S.C. 463; *Lanark County Council* v. *Motherwell Mags.*, 1912 S.C. 1251; *Yorkshire County Council* v. *Middlesbrough County Borough Council*, [1914] 2 K.B. 847; *Queenborough Corporation* v. *Sheppey Rural Council*, [1915] 1 K.B. 356; *Glamorgan County Council* v. *Cardiff City Council and Swansea Borough Council*, [1915] 3 K.B. 438; *In re Southampton County Council and Bournemouth Borough Council*, [1922] 2 K.B. 314.

1230. The committee consists of—(1) such number of county councillors, not exceeding seven, as shall be appointed by the county council annually at their meeting in May; (2) such number of the Commissioners of Supply, not exceeding seven, as shall be appointed by the Commissioners of Supply annually at their meeting on the same day; and (3) the sheriff of the county (or in his absence one of his substitutes to be nominated by him for that purpose).[4] Casual vacancies are filled up by the county council or Commissioners of Supply, as the case may be.[5] The committee elect one of their own number to be chairman, and meetings may be convened on the requisition of the chairman or of any two members.[6] The county clerk acts as clerk of the committee, "without any further appointment or remuneration." [6]

SECTION 6.—DISTRICTS AND DISTRICT COMMITTEES.

SUBSECTION (1).—*Districts.*

1231. A county is divided by the county council into districts, for the purposes of the management and maintenance of highways and the administration of the laws relating to public health. Each district must comprise a group of electoral divisions, and each parish, so far as within the county, must be included in one district. The division of a county into districts is not made where it appears to the county council unnecessary or inexpedient, in the case of a county containing fewer than six parishes, or which had not been divided into districts for the purposes of the management and maintenance of highways prior to the passing of the Local Government Act, 1889.[7]

SUBSECTION (2).—*District Committees.*

1232. A district committee is the body which administers the districts into which counties are divided for the purposes mentioned above. A district committee consists of the county councillors for the electoral divisions comprised in the district, together with one representative from the parish council of each parish comprised or partly comprised therein, and one representative of each burgh within the meaning of the Roads and Bridges (Scotland) Act, 1878,[1] where the management and maintenance of the highways within the burgh have, under the provisions of the last-mentioned Act, been transferred to the county. In the case of parishes partly landward and partly burghal, the representative from every such parish shall be a ratepayer within the meaning of the Local Government Acts.[2] The representatives of parish councils and burghs are appointed by their respective boards and town councils, and they hold office until the appointment of their successor is intimated. Burgh members are not entitled to vote on matters involving expenditure to which their constituents do not contribute.[3] The appointment of a member of a district committee, when made, is intimated to the county clerk and the clerk of the district committee. Where a county is not divided into districts, the powers, duties, and liabilities of a district committee devolve upon the county council, and for the purpose of the management of highways and public health a representative of each parish council and burgh, as above provided, is deemed to be a county councillor.[2] The representative from a parish council, elected to sit on a district committee, must be a member of the parish council which elects him.[4]

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[1] 52 & 53 Vict. c. 50, s. 18.

[2] 20 & 21 Vict. c. 72.

[3] 52 & 53 Vict. c. 50, s. 18 (7).

[4] Sec. 18 (1) and (2); *Elgin County Council* v. *Elgin Mags.*, 1897, 24 R. 537.

[5] 52 & 53 Vict. c. 50, s. 18 (3).

[6] Sec. 18 (4).

[7] Secs. 16, 17, and 77.

1233. A district committee is designated according to the district within which it acts, and it may sue and be sued under that designation.[5] A district committee may act notwithstanding any vacancy upon it. It may elect a chairman, who has a casting and deliberative vote. It may also appoint a district clerk and district treasurer, and, subject to the approval of the county council, may fix their salaries,[6] but the salaries of these officials are paid by the county council.[7] For the purpose of the regulation of its quorum and proceedings, a district committee is a committee of the county council.[8] The county council may make, vary, and revoke regulations respecting the quorum and proceedings of the committee; but, subject to such regulations, the proceedings, quorum, and place of meeting, whether within or without the county, shall be such as the committee may from time to time direct. A district committee may appoint joint-committees with any parish council or parish councils, and county council or councils, or district committees or town councils or burgh commissioners.[9]

1234. Sums required for district purposes are obtained from the county council.[10] Sums passed by the county council to the account of any district committee must be paid into an account kept in the name of the district committee with an incorporated or joint-stock bank

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[1] 41 & 42 Vict. c. 51.

[2] 52 & 53 Vict. c. 50, s. 78.

[3] *Ibid.*, s. 73 (8).

[4] 57 & 58 Vict. c. 58, s. 19 (7).

[5] 52 & 53 Vict. c. 50, s. 79.

[6] *Ibid.*, s. 80.

[7] *Ibid.*, s. 83 (6).

[8] *Ibid.*, ss. 74 and 80.

[9] *Ibid.*, s. 76; and 57 & 58 Vict. c. 58, s. 34.

[10] 52 & 53 Vict. c. 50, s. 75.

(including any branch thereof), for that purpose appointed by the county council; and all cheques on such account must be signed by two members of the district committee nominated for that purpose by the committee, and be countersigned by the district clerk.[1] The accounts of the district committee must be made up and balanced to the 15th of May in each year, and are duly audited.[2]

SECTION 7.—SPECIAL DISTRICTS.

SUBSECTION (1).—*Statutory Provisions.*

1235. The statutory provisions relating to the formation of special districts are highly complicated and urgently require consolidation and amendment in detail. By s. 11 of the Act of 1889, the county council (or its district committees) succeeded to, *inter alia*, the powers and duties of the public health local authority, and one of those powers was contained in the Public Health (Scotland) Act, 1867, ss. 76 and 89 (5), which authorised the creation of special districts for the purposes of drainage and water supply. By s. 44 of the Local Government Act of 1894 provision was made for the formation of special districts for the purposes of lighting, scavenging, and public baths, and for the adoption of certain sections of the Burgh Police Act of 1892. The Public Health Act of 1897 repealed the earlier Act of 1867, but re-enacted with modifications the provisions with regard to drainage and water supply districts, and effected certain changes in the law regarding special lighting, scavenging, and public baths districts. Finally, the Local Government Act of 1908 authorised the adoption of further provisions of the Burgh Police Acts, and effected sundry amendments in the earlier statutes. It is, accordingly, necessary to treat the various classes of special districts separately.

SUBSECTION (2).—*Special Drainage and Water Supply Districts.*

1236. The initiative in the formation or alteration of such districts may be taken either (*a*) by the local authority (*i.e.* the county council or district committee), or (*b*) by a parish council or ten ratepayers, by whom a requisition may be made to the local authority.[3] The proposal or requisition is intimated and advertised,[4] and the local authority must then meet to consider the propriety of (*a*) forming part of their district into a special drainage or water supply district; (*b*) enlarging or limiting the boundaries of such special districts; (*c*) combining special districts; or (*d*) determining that any such special districts, or a combination thereof, shall cease.[5] If the local authority determine to take action, their resolution, in which the proposed boundaries must be defined, is advertised by newspaper and handbill, and transmitted to the Scottish Board of Health and (where a district committee is acting) to the county council.[1] Notice must also be given in the *Edinburgh Gazette* stating where the plans and other particulars may be inspected.[2] Within twenty-one days thereafter any person interested may appeal to the sheriff (not being a sheriff-substitute resident within the district), who may either approve or disapprove of the resolution. The sheriff's decision is final, and a copy of his order, which must determine all questions regarding payment of debts and the right to impose and the obligation to pay assessments, is advertised and circulated in the same way as the initial resolution.[1] The town council of any burgh in the near vicinity of an area proposed to be formed into a special district may counter the proposal by a petition for extension of boundaries.[2]

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[1] 52 & 53 Vict. c. 50, s. 82.

[2] *Ibid.*, ss. 68 and 70.

[3] 60 & 61 Vict. c. 38, ss. 122 and 131.

[4] 8 Edw. VII. c. 62, s. 14.

[5] 60 & 61 Vict. c. 38, ss. 122 and 131; *Kenneth & Sons* v. *Ayrshire County Council*, 1900, 2 F. 511.

SUBSECTION (3).—*Special Lighting Districts.*

1237. The initiative in regard to the formation of such districts is conferred upon (*a*) a parish council or any two or more parish councils, or (*b*) not fewer than ten parish electors of any landward parish or of any parish partly landward and partly burghal, who may make a requisition to the district committee or county council calling upon them to form a special lighting district, and to adopt the provisions contained in ss. 99 to 105 inclusive of the Burgh Police Act of 1892,[3] or any one or more of them.[4] Where the proposed special district includes in whole or in part any special drainage or water supply district, the resolution of a district committee approving of the formation of the special district requires the approval of the county council. The procedure in relation to the formation of a special lighting district is now substantially the same as in the case of special drainage and water supply districts, owing to the changes introduced by the Acts of 1897 [5] and 1908.[2] If a requisition for the formation of a special lighting district is rejected, another requisition to the same effect cannot be considered for twelve months.[6] Subsequent changes in the area of a special lighting district may be effected by resolution of the county council or district committee, with or without a requisition.[7]

1238. If a county council or district committee desire not merely to provide public lighting but also to purchase or erect gas-works and to supply gas to private consumers they may adopt and apply in any special lighting district the Burghs Gas Supply (Scotland) Act, 1876.[8]

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[1] 60 & 61 Vict. c. 38, ss. 122 and 131; *Kenneth & Sons* v. *Ayrshire County Council*, 1900, 2 F. 511.

[2] 8 Edw. VII. c. 62, s. 14.

[3] 55 & 56 Vict. c. 55.

[4] 57 & 58 Vict. c. 58, s. 44.

[5] 60 & 61 Vict. c. 38, s. 38.

[6] 57 & 58 Vict. c. 58, s. 44 (2).

[7] *Ibid.*, s. 44 (5).

[8] *Ibid.*, s. 44 (10); see also *Montrose Asylum* v. *Brechin District Committee*, 16 S.L. Rev. 336, and *Reid Gear Co.* v. *Lower District Committee of Renfrew*, 1923 S.L.T. (Sh. Ct.) 67.

SUBSECTION (4).—*Special Scavenging Districts and Special Districts for Public Baths, etc.*

1239. For the purposes of the scavenging of, and the removal of dust, ashes, and other refuse from the streets, roads, footpaths, lands, and premises in any area, a special district may be formed in the same manner as in the case of a special lighting district. The sections to be adopted are 107 to 127 and 253 to 255 [1] inclusive of the Burgh Police Act of 1892.[2]

1240. The same procedure also applies to special districts for the provision and maintenance of public baths or bathing places, wash-houses, and drying-grounds, the provisions being ss. 309 to 314 of the Burgh Police Act.[2]

SUBSECTION (5).—*Additional Powers Available in Special Districts.*

1241. Within any special lighting, scavenging, drainage or water district the county council may [3] by resolution adopt certain further sections of the Burgh Police Act,[4] viz. ss. 144 and 145, dealing with naming of streets and numbering of houses, s. 158, dealing with projecting houses, and ss. 191 to 200, dealing with ruinous buildings.

SUBSECTION (6).—*Local Sub-Committees.*

1242. For the purpose of carrying out the purposes for which a special district has been formed, the district committee may, subject to regulations to be made from time to time with consent of the county council, appoint annually a sub-committee consisting in whole or part of local parish councillors.[5] Where a special drainage or water district is partly within a county and partly within a burgh, town councillors to the number fixed (failing agreement) by the Secretary for Scotland share with the local sub-committee the control of the special district.[6] Where such a special district is wholly within a burgh formed after 1889, the town council becomes the public health local authority for the district.[7]

SUBSECTION (7).—*Financial Provisions Affecting Special Districts.*

1243. Expenditure arising from the formation [8] or administration of a special district is defrayed out of a special district rate imposed by the county council within the special district as an addition to the Public Health rate, the limit in the case of drainage and water being 3s. per £,[1] and in the case of lighting, scavenging, and public baths 9d. per £.[2] The latter limit may be exceeded with the consent of the Scottish Board of Health.[3] These powers of assessment may in certain circumstances continue to be exercised throughout the earlier special district notwithstanding an encroachment thereon due to a burgh extension.[4] The assessor distinguishes in the Valuation Roll subjects situated in special districts.[5]

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[1] With regard to adoptive provisions see *Hill* v. *Grant*, 1899, 1 F. (J) 42.

[2] 57 & 58 Vict. c. 58, s. 44 (1).

[3] 8 Edw. VII. c. 62, s. 10.

[4] 55 & 56 Vict. c. 55.

[5] 52 & 53 Vict. c. 50, s. 81 (1); and 57 & 58 Vict. c. 58, s. 44 (8) and (9).

[6] 52 & 53 Vict. c. 50, s. 81 (2); *County Council of Dumbartonshire* v. *Clydebank Police Commrs.*, 1893, 21 R. 12, and 1894, 22 R. 64; *Kirkcaldy District Committee* v. *Buckhaven Commrs.*, 1895, 23 R. 10.

[7] 52 & 53 Vict. c. 50, s. 81 (3).

[8] *Inverarity* v. *Forfarshire County Council*, 1906, 8 F. (H.L.) 15.

SECTION 8.—POLICE DISTRICTS.

1244. The county council may, and by Order in Council may be required to, divide up their area into police districts as shall appear to be most convenient, and in such cases the expense of the force is divided into two parts, (*a*) general, and (*b*) local expenditure; the general expenditure being defrayed by the entire area, and the local expenditure falling upon the particular districts.[6]

SECTION 9.—JOINT COMMITTEES.

SUBSECTION (1).—*Composition.*

1245. County councils and town councils may from time to time join in appointing, out of their respective bodies, a joint committee for any purpose of the Local Government Act, 1889, in which they are jointly interested.[7] The county council may delegate to the committee any powers which they exercise, provided they do not delegate any power of raising money by loan or rates.[8] Subject to the powers delegated, any joint committee, in respect of any matter delegated to it, has the same power as the councils appointing it.[9] The members of a joint committee are appointed at such times and in such manner as may be from time to time fixed by the council who appointed them, and the joint committee holds office for such time as may be fixed by such council.[10] The number of members of a joint committee is fixed by arrangement of the councils appointing. The joint committee elects a chairman, who holds office for such period as is fixed at the time of his election; and where there is an equality of votes for two or more persons as chairman, one of those persons is elected by lot. The chairman has a casting as well as a deliberative vote.[11]

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[1] 60 & 61 Vict. c. 38, ss. 133, 134.

[2] 57 & 58 Vict. c. 58, s. 44.

[3] 8 Edw. VII. c. 62, s. 14.

[4] *Burgh of Leven* v. *Fife County Council*, 1925 S.L.T. 691; *Tolmie* v. *Urray Parochial Board*, 1890, 17 R. 1027, and cases in note 6 on previous page.

[5] 57 & 58 Vict. c. 58, s. 45.

[6] 20 & 21 Vict. c. 72, ss. 58–60.

[7] 52 & 53 Vict. c. 50, s. 76 (1); see also 57 & 58 Vict. c. 58, s. 34.

[8] 52 & 53 Vict. c. 50, s. 76 (2) and (3).

[9] Sec. 76 (4).

[10] Sec. 76 (5).

[11] Sec. 76 (7).

SUBSECTION (2).—*Costs.*

1246. The costs of a joint committee are defrayed by the councils by whom its members were appointed, in the proportion agreed to by them. The proportion of the costs falling to be defrayed by any county council or town council is paid out of the county fund or burgh fund, as the case may be, and is provided for by a rate imposed and levied as nearly as possible in the same manner and subject to the same provisions as if the costs had been incurred by the county council or by a district committee, or by the town council, as the case may be.[1]

SUBSECTION (3).—*Proceedings and Powers.*

1247. The councils appointing a joint committee may, jointly, from time to time make, vary, and revoke regulations respecting the quorum, proceedings, and place of meeting of the joint committee.[1] Under s. 15 of the Local Government Act of 1889 the Secretary for Scotland may transfer to a county council the powers, duties, and liabilities of certain Government departments and other authorities. Where such powers, duties, and liabilities arise within two or more counties, they may be transferred to the county councils of such two or more counties jointly, and may be exercised and discharged by a joint committee of such councils.[2]

1248. Where a bridge (not turnpike previous to 1878) is not wholly situated in one county or burgh, the management of the bridge, failing agreement, is vested in a joint bridge committee appointed by the trustees or local authorities chargeable with the cost of maintenance and rebuilding, unless on an application of either party to determine otherwise. The committee is appointed annually, not more than five persons representing each road authority. The joint bridge committee appoints its chairman and remunerates its officers. In case of a difference of opinion, the representatives of each road authority have one vote, and where there is equality in voting the question is referred to a standing arbitrator, to be named annually, or, failing such nomination, to the Sheriff of any adjoining county.[3]

1249. The Secretary for Scotland, by Provisional Order made on the application of the council of any of the counties and burghs concerned, may constitute a joint committee or other body representing all the counties and burghs through or by which a river or any part or tributary thereof passes, and may confer on such committee all the powers of a sanitary authority under the Rivers Pollution Prevention Act, 1876.[4] The Secretary for Scotland may make provisions respecting the constitution and proceedings of the said committee or body, and may provide for the payment of the expenses of such committee or body by the counties and burghs represented by it, and for the audit of the accounts of such committee or body, and their officers.[1]

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[1] 52 & 53 Vict. c. 50, s. 76 (8).

[2] Sec. 15 (3).

[3] 41 & 42 Vict. c. 51, ss. 37–39.

[4] 39 & 40 Vict. c. 75.

1250. Any parish council, or parish councils and county councils or district committees, or town councils or burgh commissioners, may, from time to time, join in appointing, out of their respective bodies, a joint committee for any purpose of the Local Government (Scotland) Act, 1894,[2] in which they are jointly interested. The provisions of s. 76 of the Local Government Act, 1889, with regard to the appointment and management of joint committees, apply to joint committees of a parish council.

SECTION 10.—OFFICERS.

SUBSECTION (1).—*Officers of Former Authorities.*

1251. Persons who were officers of any of the authorities whose powers were transferred to the county council, became the servants of the county council. These officers hold their office by the same tenure as if the Local Government Act, 1889, had not been passed. The council may redistribute the business of these officers, and may abolish unnecessary offices, subject to compensation where an officer so transferred suffers pecuniary loss by such arrangement.[3]

SUBSECTION (2).—*Appointment and Dismissal.*

1252. The county council may appoint a county clerk, treasurer, collector or collectors, assessors, surveyors, and such other inspectors, officers, and servants as may be necessary for the efficient execution of the duties of the county council. A county councillor or the partner in business of a county councillor cannot be appointed to any office or place of profit under the county council or any committee thereof, and the disqualification shall apply during six months after such person has ceased to be a county councillor.[4] Regulations may be made with regard to the duties of these officials, and, if expedient, one person may be appointed to fill two or more offices, and two or more persons may be appointed jointly to fill one office. The council may pay such salaries as they think proper, and the officials shall hold office at the pleasure of the council. The council may at any time discontinue the appointment of any officer appearing to them not necessary to be reappointed.[5]

SUBSECTION (3).—*The County Clerk.*

1253. The clerk of the county council discharges all the rights and duties formerly exercised by the clerk of supply, who was the clerk of the Commissioners of Supply. He becomes county clerk for all purposes except (1) as regards highways, so long as the existing county road clerk is continued by the county council;[1] and (2) as regards duties transferred from the justices, so long as the existing clerk of the peace holds office; after which these duties fall to be discharged by the county clerk without additional remuneration.[2]

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[1] 52 & 53 Vict. c. 50, s. 55.

[2] 57 & 58 Vict. c. 58, s. 34.

[3] 52 & 53 Vict. c. 20, ss. 118, 120.

[4] Sec. 83 (5).

[5] Sec. 83 (6) and (7).

SUBSECTION (4).—*The Assessor.*

1254. The consent of the Treasury is required to an appointment of an officer of inland revenue as assessor, and an appointment made without such consent has no effect.[3] Burgh representatives are entitled to vote.[4] In the event of an appointment of an officer of inland revenue, any regulations made by the county council as to his duties are subject to the approval of the Treasury.[5] A resolution of the county council to have the Valuation Roll printed is not a "regulation" in regard to the duties of an assessor requiring the approval of the Treasury.[6]

SUBSECTION (5).—*Medical Officer and Sanitary Inspector.*

1255. The county council must appoint a medical officer and a sanitary inspector, who are not permitted to engage in private practice, except with the written consent of the council. The medical officer must be a registered medical practitioner, and the holder of a diploma in sanitary science, public health, or State medicine, under s. 21 of the Medical Act, 1886. No sanitary inspector, except with the consent of the Local Government Board, can be appointed as the sanitary inspector for the county, unless he has been, for three consecutive years previous to his appointment, the sanitary inspector of a local authority under the Public Health Acts.[7] The medical officer and sanitary inspector are only removable from office with the sanction of the Local Government Board.[8]

SUBSECTION (6).—*Returning Officer.*

1256. The county council, at its meeting in October preceding an election, appoints the returning officer.[9]

SECTION 11.—PROCEEDINGS OF THE COUNTY COUNCIL.

SUBSECTION (1).—*Meetings.*

1257. There must be not less than three meetings of the county council annually—one in December, one in May, and one in October.[10] A county council may make, vary, and revoke such regulations as they think fit with respect to the summoning, notice, time, place, management, and adjournment of their meetings, and generally with respect to the transaction and management of their business.[1] A quorum of the county council, unless the council with the consent of the Secretary for Scotland otherwise determine, consists of one-fourth of the whole number of the council.[2] A county council may act notwithstanding any vacancy or vacancies, caused by insufficient election or otherwise, provided a quorum exists.[3] The notice of a meeting of the county council at which any resolution for the payment of a sum exceeding fifty pounds out of the county fund, or any resolution for incurring any expenses, debt, or liability exceeding fifty pounds, will be proposed, must state the amount of the sum, expenses, debt or liability, and the purpose for which it is to be paid or incurred.[4]

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[1] 52 & 53 Vict. c. 20, s. 83 (2).
[2] Secs. 83, 84.
[3] Sec. 83 (4).
[4] *County Council of Ayr* v. *Paterson*, 1906, 8 F. 796.
[5] 52 & 53 Vict. c. 20, s. 83 (3).
[6] *County Council of Lanarkshire* v. *Lord Advocate*, 1892, 19 R. 617.
[7] 52 & 53 Vict. c. 20, ss. 52 and 54.
[8] Sec. 54 (3).
[9] Sec. 30 (2).
[10] 52 & 53 Vict. c. 50, s. 73 (2); and 8 Edw. VII. c. 62, s. 9 (2).

SUBSECTION (2).—*Convener and Vice-Convener.*

1258. The chairman of the county council is called the convener of the county, and he holds office for one year.[5] He is elected annually by the council from among the councillors, at the meeting on the third Tuesday of December. The election of a chairman is the first business to be transacted at the meeting.[6] He is eligible for re-election, and is, in virtue of his office, a justice of the peace for the county.[5] A vice-convener is also elected on the same date. A casual vacancy in the office of convener or vice-convener, whether caused by death, resignation, or disqualification, is filled up by the county council, and the person so appointed retains his office so long only as the vacating convener or vice-convener would have retained office if such vacancy had not occurred.[5] Where the convener and vice-convener are absent, the councillors present choose a chairman from among their number. The chairman of a meeting has a casting as well as a deliberative vote. When at the election of the chairman of a meeting an equal number of votes is given in favour of two or more persons, the meeting shall determine by lot which of these persons shall be chosen.[6]

SUBSECTION (3).—*Disqualification from Voting.*

1259. At meetings of a county council, councillors or members of district committees appointed to represent a burgh or an electoral division, consisting of a police burgh or part of a police burgh, shall not vote or act in respect of any matters involving expenditure to which such burgh does not contribute, or for which it is not assessed.[7]

SUBSECTION (4).—*Committees.*

1260. A county council has general powers of delegating business to committees, but it cannot delegate to a committee any power of raising money by rate or loan.[1] A county council may make, vary, and revoke regulations respecting the quorum and proceedings of a committee, but, subject to such regulations, the proceedings and quorum and the place of meeting, whether within or without the county, shall be such as the committee may from time to time direct, and the chairman at any meeting of the committee has a casting as well as a deliberative vote.[2] These provisions do not apply to the standing joint committee, or to any other joint committee, but they do apply to a district committee.[3]

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[1] 52 & 53 Vict. c. 50, s. 73 (7).

[2] Sec. 73 (3).

[3] Sec. 73 (4).

[4] Sec. 75 (4).

[5] Sec. 10.

[6] Sec. 73 (5).

[7] Sec. 73 (8).

1261. A county council annually appoints a "finance committee" for regulating and controlling the finance of the county.[4] As the local financial year begins in May, the appointment will be made at the meeting in that month.[5] Payments out of the county fund can only be made in pursuance of orders of the county council, signed by three members of the finance committee, and countersigned by the county clerk. But to this rule there are important exceptions, viz. in the case of (1) payments in pursuance of the specific requirements of an Act of Parliament; (2) payments in pursuance of a decree of a competent Court; (3) payments on the requisition of a district committee, or the standing joint committee; (4) periodical payments of salaries and wages.[6] No expenses, debt, or liability exceeding £50 can be incurred by a county council except upon a resolution of the county council, passed on an estimate submitted by the finance committee.[7] The exceptions above noted apply to this rule. Cheques for payment of moneys must be signed by two members of the finance committee, and be countersigned by the county clerk, or by a deputy approved by the council.[5] The finance committee of the county council must prepare annually estimates of the receipts and expenses of the county fund, and of the sums required to be raised to meet the deficiency of such fund for the expenditure chargeable thereon.[8]

1262. The valuation committee is appointed annually and consists of not less than five nor more than twenty members.[9]

1263. Where an executive committee is appointed under the Contagious Diseases Acts, the council may appoint persons to act who are not members of the local authority.[10]

1264. Besides these committees, the council elects (*a*) not more than seven of its members to act on the standing joint committee;[11] (*b*) a prison visiting committee, as directed by the Secretary for Scotland;[12] and (*c*) three visitors of the district lunatic asylums.[13]

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[1] 52 & 53 Vict. c. 50, s. 73 (1).

[2] Sec. 74.

[3] Secs. 76 (9), 80.

[4] Sec. 75 (3).

[5] Sec. 62 (1).

[6] Sec. 75 (1).

[7] Sec. 75 (3).

[8] Sec. 26 (6).

[9] 42 & 43 Vict. c. 42, s. 5.

[10] 52 & 53 Vict. c. 50, s. 73 (1); and 57 & 58 Vict. c. 57, s. 31, and Schd. IV.

[11] 52 & 53 Vict. c. 50, s. 18 (1).

[12] 40 & 41 Vict. c. 53, s. 14.

[13] 20 & 21 Vict. c. 71, s. 26. With regard to district committees, joint committees, and local subcommittees, see paras. 1232, 1245, and 1242 above.

SECTION 12.—FINANCE.

SUBSECTION (1).—*The County Fund.*

1265. The financial affairs of the county are under the management and control of the county council, and all the property and assets of the former administrative authorities in a county are taken over by the council.[1] The county council annually appoints a finance committee for regulating and controlling the finance of the county.[2] The county fund is the sum of all the cash funds of the county. The funds have to be lodged in bank;[3] and in order to keep the different departments of county finance distinct, it is necessary that separate bank accounts should be kept for such important branches of expenditure as police, the maintenance of roads, road debt, public health, etc.

SUBSECTION (2) *Revenue.*

1266. The receipts of the county, from whatever source, must be carried to the county fund.[3] Payments are made to the county treasurer. Where capital sums are recovered by a council in course of any adjustment of liabilities with other bodies, they must be applied either in repayment of debt, or for any other purpose for which capital money may be applied.[4] The county sources of income other than county rates are—

1. Payments from the Treasury into the Local Taxation (Scotland)[5] Account. These payments are specially appropriated to certain objects.[6]

2. Penalties incurred under the Act[7] and under other Acts, and also fees exigible under any statute administered by the county council (*e.g.* The Weights and Measures Act, 1878).[8]

3. Contributions from burghs which contribute towards the expenditure for the administration of the police and of the Contagious Diseases (Animals) Act.[9]

SUBSECTION (3).—*Expenditure.*

1267. Payments are made in the first instance out of the county fund,[10] and are made through the treasurer. Cheques must be signed by two members of the finance committee, and countersigned by the county clerk, or by a deputy appointed by the council. No expense, debt, or liability exceeding £50 can be incurred except upon a resolution of the county council, passed on an estimate prepared by the finance committee. No payment, whether of capital or income, can be made out of the county fund, except on an order of the council passed on the recommendation of the finance committee.[2] The order must be signed by three members of the finance committee, and countersigned by the county clerk. The order may include several payments. This rule does not apply to payments in pursuance of the specific requirements of an Act of Parliament, or of a decree of a competent Court, or payments on the requisition of a district committee or standing joint committee, or periodical payments of salaries and wages.[1] If the legality of an order for payment by the council is challenged it may be stayed by note of suspension in the Bill Chamber.

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[1] 52 & 53 Vict. c. 50, s. 25.

[2] Sec. 75.

[3] Sec. 26 (2).

[4] Sec. 50 (5).

[5] Secs. 20, 21.

[6] Sec. 22; also 53 & 54 Vict. c. 60, s. 2; 55 & 56 Vict. c. 51, s. 2; and 61 & 62 Vict. c. 56, s. 2.

[7] 52 & 53 Vict. c. 50, s. 94.

[8] 41 & 42 Vict. c. 49.

[9] 52 & 53 Vict. c. 50, ss. 60 and 66.

[10] Sec. 26 (2).

1268. Besides the expenditure incurred in administering the business specifically transferred, the county council must defray the charges formerly borne by the county general assessment,[2] including salaries and outlays of county officials; salaries and outlays of procurator-fiscals in the Sheriff and Justice of Peace Courts, and of the clerk of the peace, so far as these were formerly paid by the county;[3] the expenses of searching for, apprehending, subsisting, prosecuting, or punishing criminals; the expenses of maintaining, insuring, cleaning, etc., court-houses or other county buildings; the expenses, to a fixed limit, of striking the "fiars prices" for each county; the expenses previously directed by Acts of Parliament to be defrayed out of "rogue money";[3] and the expenses of executing certain statutes, such as the Weights and Measures Act and the Sale of Food and Drugs Acts.[4] No "capital works," *i.e.* works involving capital expenditure, can be undertaken by a county under the powers transferred by the Local Government Act, 1889, or under any other Act, without the consent in writing of the standing joint committee.[5]

SUBSECTION (4).—*Budget.*

1269. The finance committee must present annually to the county council, at their meeting in October, a budget containing estimates of the receipts and expenses of the county fund, and of the sums required to be raised to meet the deficiency of such fund for the expenditure. The county council revise the estimates and authorise the expenditure, and make provision for meeting it.[6]

SUBSECTION (5).—*Rates.*

1270. The deficiency in the county fund in respect of each branch of expenditure is met by rates imposed by the council, which are levied in the form of consolidated rates, divided into owners' consolidated rate and occupiers' consolidated rate. The rates formerly levied by the commissioners of supply, except those under the Contagious Diseases (Animals) Act, were payable by the owner only. The Sheriff was directed to ascertain what had been, during ten years before Whitsunday 1889, the average amount of each such rate, and to cause it to be recorded. When ascertaining the average rate in respect of each branch of expenditure, the Sheriff was to exclude any portion of a rate applicable to the payment of interest and repayment of principal of money borrowed in respect thereof previous to 1889. Until any money so borrowed had been repaid, a rate sufficient to provide for payment of interest and repayment of principal was payable by owners only, and was included in the owners' consolidated rate. The "average rate" thus fixed by the Sheriff was paid in perpetuity by the owners.[1] By section 9 of the Rating (Scotland) Act, 1926, the "average rate" was abolished, and all county rates, old and new (including road rates, public health rates, contagious diseases rates), and whether to meet ordinary expenditure or to meet the interest of money borrowed after the passing of the Act, are now payable equally by owners and occupiers.[2] Since Whitsunday 1927 the county council has been the rating authority for parish and education rates.[3]

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[1] 52 & 53 Vict. c. 50, s. 75.

[2] Sec. 89; and 31 & 32 Vict. c. 82, s. 3.

[3] See *Lanarkshire County Council* v. *Hart*, 1904, 6 F. (H.L.) 31.

[4] See *Smith* v. *Ayrshire County Council*, 1907 S.C. 649.

[5] 52 & 53 Vict. c. 50, s. 18 (6).

[6] Secs. 26 and 71; see also Rating (Scotland) Act, 1926 (16 & 17 Geo. V. c. 47), s. 25 (3).

1271. Any rate necessary for a purpose for which no statutory provision is made, is imposed as a general purposes rate.[4] Any rates for the management and maintenance of highways, the administration of the laws relating to public health, and for any special purpose in respect of which the county has been divided into divisions or districts under any Act, are imposed within each such division, district, or parish.[5] All the rates are levied on the gross annual value of lands and heritages as appearing on the Valuation Roll, subject to the new scheme of classification introduced by the Rating (Scotland) Act, 1926.[2]

Every ratepayer must be assessed, but any person may, on application, be relieved from payment of rates on the ground of poverty. The owner, in the case of short lets, may be charged with the occupiers' rates,[6] and in the case of an unoccupied and unfurnished house may be exempted from payment of occupier's rates.[7] Where there is a change in the occupancy of subjects ordinarily let for more than a year the rates may be allocated against the old[8] and new occupiers.

1272. The demand note must set forth the several branches of expenditure in respect of which the consolidated rates are imposed, the amount in the pound applicable to each several branch, and the amount to be paid by the person named in the note, and the time and manner of appealing and paying, and such other particulars as shall be prescribed.[9] It must also set forth the particulars required by s. 22 of the 1926 Act.[2]

1273. The rates imposed are for the local financial year, from the 15th May preceding the date of imposing them. They are payable on a day fixed by the county council, not earlier than the 1st November.[10]

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[1] 52 & 53 Vict. c, 50, s. 27 (4).

[2] 16 & 17 Geo. V. c. 47.

[3] *Ibid.*, ss. 1–6.

[4] 52 & 53 Vict. c. 50, s. 27 (1).

[5] *Ibid.*, ss. 26 (4), 27 (1).

[6] 16 & 17 Geo. V. c. 47, s. 16.

[7] *Ibid.*, s. 23.

[8] *Ibid.*, s. 17.

[9] 52 & 53 Vict. c. 50, s. 62 (2).

[10] *Ibid.*, s. 62 (1).

The county council may resolve to put into operation the machinery provided by s. 19 of the Rating (Scotland) Act 1926 for payment of rates by instalments. The county council have powers of summarily recovering rates by legal process.[1] The council may fix a time and place for hearing appeals against rates, and may decide whether they are to be heard by the council or by a committee or committees thereof.[2] The county council may make regulations in regard to rating, provided that public notice of their import has been given, for two successive weeks, by advertisement in a local newspaper and in the *Edinburgh Gazette*, and that they have been confirmed by the Sheriff.[3]

SUBSECTION (6).—*Rating in Burghs.*

1274. The lands and heritages within police burghs were formerly assessed, in respect of expenditure on the administration of the police [4] (except where a separate police force was maintained) and of the Contagious Diseases (Animals) Acts, in the same manner as other lands and heritages within the county.[5] Other burghs liable to contribute to the county fund are not and never have been assessed by the county council, and since Whitsunday 1927 police burghs have been placed in the same position as other burghs for rating purposes.[6] The procedure is as follows: The rateable property of the burgh, as appearing on the Valuation Roll of the burgh, is included in the rateable property of the county; and the amount of consolidated rates applicable to the purposes mentioned is ascertained and fixed as if the burgh were one of the parishes in the county. The county council annually, and not later than 15th July in each year, send a requisition to the town council of the burgh, requiring them to pay the sum or sums which they are liable to contribute to the county fund in aid of the expenditure set forth in the requisition, and the town council must pay the sum or sums out of the police assessment, or, if there is none, out of the common good, before the 15th January next ensuing.[7]

SUBSECTION (7).—*Borrowing.*

1275. The county council cannot delegate any power to raise money by loan.[8] The county council may, with the consent in writing (signed by two members and the county clerk) of the standing joint committee, borrow, on the security of any rate, such sums as may be required for the following purposes:—[9]

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[1] 52 & 53 Vict. c. 50, ss. 26 (5), 62 (5); 16 & 17 Geo. V. c. 4, s. 23 (2).

[2] 52 & 53 Vict. c. 50, s. 62 (3).

[3] *Ibid.*, s. 63.

[4] *Peterhead Mags.* v. *Aberdeenshire County Council*, 1899, 2 F. 45.

[5] 52 & 53 Vict. c. 50, s. 60 (5).

[6] 16 & 17 Geo. V. c. 47, s. 16.

[7] 52 & 53 Vict. c. 50, ss. 60 and 66; 16 & 17 Geo. V. c. 47, s. 25 (1) and (2); see also *MacArthur* v. *Argyllshire County Council*, 1898, 25 R. 829, and *Galashiels Mags.* v. *Selkirk County Council*, 1896, 23 R. 818.

[8] 52 & 53 Vict. c. 50, s. 73.

[9] *Ibid.*, s. 67.

(i) For any purpose for which any authority, whose powers are by the Act transferred to the council, were authorised to borrow. The principal borrowing powers transferred are those in relation to police-stations,[1] sheriff court-houses,[2] sewers,[3] water supply,[4] hospitals,[5] and new roads.[6]

(ii) For any purpose for which the county council is authorised to borrow under the Act, *e.g.* section 50 (4).

(iii) For making advances to any persons in aid of the emigration or colonisation of the inhabitants of the county, with a guarantee for repayment of such advances from any authority in the county, or the Government of any colony.[7]

1276. If in any year payments have to be made by the county council in connection with the current annual expenditure, for the purposes of any of the Acts of Parliament administered by them, before the rates applicable to that head of expenditure for the year are paid, the county council may, without consent, borrow from a bank or other company or person, on security of the rate still due and unreceived, but not to an amount greater than half of such rate. When any money has been so borrowed, the council cannot borrow on the security of the rates of any other year, until the loan has been paid off.[8] Loans raised on the security of a rate must be charged to the special account to which the expenditure for that purpose is chargeable.[9]

1277. Within twenty-one days after the expiry of the financial year, the council must make a return to the Secretary for Scotland of loans, and the measures taken for their repayment.[10] A loan under heads (i), (ii), and (iii), *supra*, must be repaid within a period not exceeding thirty years, determined by the council, with the consent of the standing joint-committee.[11] In the case of housing loans the limit is eighty years.[12] The loan may be paid off by equal yearly or half-yearly instalments of principal, or of principal and interest combined, or by means of a sinking fund, set apart, invested, and applied in accordance with regulations which may be framed by the Secretary for Scotland. Where they have statutory borrowing power, a county council may create stock under the Local Authorities Loans (Scotland) Acts, 1891 and 1893.[13] By the County Council (Scotland) (Finance) Order, 1907, dated 23rd May 1907, made by the Secretary for Scotland under s. 44 (6) of the Act of 1894,[14] borrowing was authorised for specified purposes in special lighting and scavenging districts.[15] See further under BORROWING POWERS.

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[1] 20 & 21 Vict. c. 72, s. 57.

[2] 23 & 24 Vict. c. 79, s. 26.

[3] 60 & 61 Vict. c. 38, s. 139.

[4] *Ibid.*, s. 140.

[5] *Ibid.*, s. 141.

[6] 41 & 42 Vict. c. 78, s. 58.

[7] 52 & 53 Vict. c. 50, s. 67.

[8] *Ibid.*, s. 67 (4).

[9] *Ibid.*, s. 67 (5).

[10] *Ibid.*, s. 67 (6).

[11] *Ibid.*, s. 67 (2).

[12] 9 & 10 Geo. V. c. 60, s. 6.

[13] 54 & 55 Vict. c. 34, and 56 Vict. c. 8.

[14] 57 & 58 Vict. c. 58, s. 44 (6).

[15] The order is printed in the Councillor's Manual, A 183.

SUBSECTION (8).—*Accounts and Audit.*

1278. The accounts of the county fund and of the money raised by rates must be kept in such a way as will prevent a rate being applied to any purpose to which it is not properly applicable.[1] Accounts of receipts and expenditure of a county council and its district committees must be made up and balanced to the 15th day of May in each year, and they must be completed and signed before that date by such person or officer as the Secretary for Scotland prescribes.[2] An auditor is appointed by the Secretary for Scotland, who also makes regulations as to his duties.[3] The county clerk gives fourteen days' notice of the time of audit, and also of the name and address of the auditor. An abstract of the accounts, balanced and signed as stated above, with all books and papers referred to in the accounts, must be deposited in the offices of the county council, and open within certain hours to the inspection of ratepayers for seven days before the audit. Extracts and copies of the accounts may be taken. Any officer of the county council is liable in penalties for refusing to allow inspection of the accounts. Any ratepayer may take objection to the accounts, or any part of them. A note of objections in writing must be sent to the auditor, and a copy to the officer concerned, two clear days before the time fixed for audit. Any ratepayer may appear at the audit to support his objections, or another ratepayer may do so for him.[4] The rules to be observed by the auditor, and the provisions as regards illegal payments and surcharges, are to be found in s. 70.[5]

SECTION 13.—POWERS AND DUTIES.

SUBSECTION (1).—*General Classification.*

1279. The powers and duties of a county council may be conveniently grouped on the basis of s. 11 of the Act of 1889 as follows, viz.:—

(i) Powers and Duties transferred from Commissioners of Supply;

(ii) Powers and Duties transferred from the County Road Trustees;

(iii) Powers and Duties transferred from the Local Authorities of Counties under the Contagious Diseases (Animals) Acts, and the Destructive Insects Act, 1877;

(iv) Powers and Duties transferred from the Local Authority under the Public Health Acts.

(v) Administrative Powers and Duties transferred from the Justices of the Peace; and

(vi) Further Powers.

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[1] 52 & 53 Vict. c. 50, s. 26 (5).

[2] *Ibid.*, s. 68.

[3] *Ibid.*, s. 69.

[4] *Ibid.*, s. 70, and 8 Edw. VII. c. 62, s. 17.

[5] See also *Lanarkshire County Auditor* v. *Lambie*, 1905, 7 F. 1049; *Maclachlan* v. *Cameron*, 1899, 6 S.L.T. 384.

SUBSECTION (2).—*Powers and Duties transferred from the Commissioners of Supply.*

1280. These powers included:—

(*A*) The power of assessing for general county purposes.[1]

(*B*) Police administration under the Police (Scotland) Act, 1857.[2] The county council provides for the general police administration, not only of the county proper, but also of all burghs therein with a population of less than 7000, or which did not in 1889 maintain a separate force,[3] and keeps books of its accounts and proceedings. The county council is the only body which can assess or borrow for police purposes. The practical administration of the Police Act is in the hands of the standing joint-committee as the "Police Committee" under the Act of 1857.[4] See POLICE.

(*C*) Valuation.—The county council appoints assessors and a committee, called the county valuation committee, to hear and determine appeals under the Valuation Acts.[5]

(*D*) Registration of Parliamentary Voters.—This matter is now regulated by the Representation of the People Acts, 1918 to 1922, the principal administrative provisions being contained in s. 43 of the Act of 1918.[6]

(*E*) Lunacy.—The administration of the Lunacy Acts has been substantially altered by the Mental Deficiency Act of 1913,[7] which by s. 22 empowers the General Board of Control to make provision for the representation of any authority on a district board.

(*F*) Prisons.—The county council elects prison visitors.[8] See PRISONS.

(*G*) Sale of Foods and Drugs.—Each county council may (and, if required by the Secretary for Scotland, must) appoint one or more competent analysts for the purpose of enforcing these Acts. The county council may claim payment of all penalties recovered under these Acts.[9]

(*H*) Sheriff Court-Houses.—The powers and duties of the county council are to provide suitable Sheriff Court accommodation when required, and to execute necessary repairs on existing court-houses.[10]

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[1] 31 & 32 Vict. c. 82, except the part repealed by 52 & 53 Vict. c. 50, s. 12 (1). See para. 1270, *supra*.

[2] 20 & 21 Vict. c. 72. See POLICE.

[3] 52 & 53 Vict. c. 50, s. 13.

[4] *Dumfriesshire County Council* v. *Phyn*, 1895, 22 R. 538; *Girdwood* v. *Midlothian Standing Joint-Committee*, 1894, 22 R. 11; *Dornan* v. *Lanarkshire County Council*, 1916, 2 S.L.T. 282; *Peterhead Mags.* v. *Aberdeenshire County Council*, 1899, 2 F. 45.

[5] 42 & 43 Vict. c. 42. See VALUATION. As regards printing of the Valuation Roll, see *Lanarkshire County Council* v. *Lord Advocate*, 1892, 19 R. 617.

[6] 8 Geo. V. c. 64. See ELECTION LAW.

[7] 3 & 4 Geo. V. c. 38. See INSANITY AND LUNACY.

[8] 40 & 41 Vict. c. 53, s. 113. See PRISONS.

[9] 38 & 39 Vict. c. 63; 50 & 51 Vict. c. 9, and 62 & 63 Vict. c. 51. See FOOD AND DRUGS.

[10] 23 & 24 Vict. c 79, and 47 & 48 Vict c. 42.

(*I*) Reformatories and Industrial Schools.—This matter is now regulated by the Children Act, 1908,[1] under which the county council has certain duties in regard to the reception and maintenance of youthful offenders.[2]

SUBSECTION (3).—*Powers and Duties transferred from the County Road Trustees.*

1281. These powers include the following:—

(*A*) Roads and Bridges.—The county council undertakes the general management of the highways and bridges within the county, which in the general case is divided into districts for this purpose, the district committee coming in place of the "district road committee" under the Roads and Bridges Act, 1878. The county council appoints a county road board, consisting of not more than thirty councillors for this purpose, and this board comes in place of the county road board under the Act of 1878. The road board is the executive of the county council in all matters relating to the construction of new roads and bridges, while the district committee (or, if none, the county council) is charged with road management and maintenance. Additional powers and duties are conferred on highway authorities by the Act of 1908, which deals with the widening and improvement of roads and bridges,[3] joint action for improving roads and bridges in the area of a neighbouring authority;[4] repair of sudden damage;[5] use of machinery in quarries;[6] and fencing of quarries;[7] and by the Development Act of 1909[8] and the Roads Act of 1920.[9] See ROADS AND BRIDGES.

(*B*) Piers and Ferries.—The regulation of piers and ferries and accesses thereto is now dealt with in the Act of 1908,[10] s. 11, which imposes various duties upon county councils.

(*C*) Locomotives.—The county council, as the road authority, enforces the provisions of the Locomotives Acts, and it may make by-laws regulating the use of county roads by locomotives.[11] The county council is also a local authority under the Motor Car Act, 1903,[12] and the Roads Act, 1920.[9]

SUBSECTION (4).—*Powers and Duties transferred from the Local Authorities of Counties under the Contagious Diseases (Animals) Acts, etc.*

1282. The county council, as local authority, must, subject to the direction of the Board of Agriculture, enforce the provisions of the

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[1] 8 Edw. VII. c. 67.

[2] Secs. 74 and 132 (21). See CHILDREN AND YOUNG PERSONS and EDUCATION.

[3] 8 Edw. VII. c. 62, s. 19.

[4] *Ibid.*, s. 21.

[5] *Ibid.*, s. 22.

[6] *Ibid.*, s. 26.

[7] *Ibid.*, s. 27.

[8] 9 Edw. VII. c. 47.

[9] 10 & 11 Geo. V. c. 72. See MOTOR CARS.

[10] 8 Edw. VII. c. 62. See FERRIES.

[11] 24 & 25 Vict. c. 70; 28 & 29 Vict. c. 89; 41 & 42 Vict. c. 58, and 3 Edw. VII. c. 36.

[12] 3 Edw. VII. c. 36.

Diseases of Animals Acts, 1894 to 1922,[1] and of all Orders in Council which relate to these Acts or to the Destructive Insects Act.[2] In the administration of these Acts the county council may act through an executive committee.[3] The county council is the local authority in all burghs with a population of less than 7000 or which do not contribute to return a member to Parliament.

SUBSECTION (5).—*Powers and Duties transferred from Local Authorities under the Public Health Acts.*

1283. Prior to the Local Government Act, 1889, the local authority for the administration of public health was the parish, but by that Act the whole powers and duties of the county local authorities were transferred to the county council.[4] The county, in the general case, is divided for public health purposes into districts, each district being controlled by a district committee, which becomes the local authority of the district, and is the executive in administering the Public Health Acts, except those relating to medical officers and sanitary inspectors, and subject to the following provisions: (1) The district committee cannot assess or borrow; (2) the district committee must conform to regulations made by the county council; (3) any five ratepayers in a district may appeal from the district committee to the county council, except in relation to proceedings for removal of nuisance, and a similar right of appeal is given to the medical officer and sanitary inspector.[5] Officers for public health purposes may be appointed for the whole district or any part thereof.[6] Any deficiency is met by a rate imposed within the district.[7]

1284. The Acts administered by the district committees include the Public Health Acts, 1891 to 1911; the Infectious Diseases (Notification) Act, 1889; the Cleansing of Persons Act, 1897; the Midwives Act, 1915; the Maternity and Child Welfare Act, 1918; the Milk and Dairies Acts, 1914 and 1922; the Housing Acts, 1890 to 1924; the Town Planning Acts, 1909 to 1923; the Rag Flock Act, 1911; the Alkali Works Regulation Act, 1906; the Factory and Workshop Acts, 1891 to 1920; and the Smoke Nuisance Acts, 1857 and 1865.[8]

SUBSECTION (6).—*Administrative Powers and Duties transferred from the Justices of the Peace.*

1285. These powers include the following:—

(*A*) Gas Meters.—This matter is now governed mainly by the Gas Regulation Act, 1920.[9] The old Act of 1859[10] is still in operation.

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[1] The principal Act is 57 & 58 Vict. c. 57. See ANIMALS.

[2] 40 & 41 Vict. c. 68.

[3] 57 & 58 Vict. c. 57, s. 31.

[4] 52 & 53 Vict. c. 50, s. 11 (4).

[5] *Ibid.*, s. 17 (2).

[6] *Ibid.*, s. 17 (3).

[7] *Ibid.*, s. 17 (4).

[8] See PUBLIC HEALTH, HOUSING.

[9] 10 & 11 Geo. V. c. 28. See GAS.

[10] 22 & 23 Vict. c. 66.

(*B*) Under the Explosives Acts, 1875 and 1923.[1] These relate to the licensing of factories and magazines for explosives, and the registration of retail premises with the local authority.

(*C*) Under the Weights and Measures Acts, 1878 to 1919.[2]—The county council must provide for local use standards of measure and weight, and they must provide for the stamping of measures and weights which have been properly verified. Inspectors of weights and measures must be appointed, and by-laws may be made.

(*D*) Under the Inebriates Acts, 1879 to 1900.[3]—These Acts relate to the licensing of retreats for inebriates.

(*E*) Under the Wild Birds Protection Acts, 1880 to 1908.[4]

(*F*) The appointment of visitors of lunatic asylums.[5]

(*G*) The registration of the rules of scientific societies.[6]

1286. In regard to all the transferred powers, provision is made for the summary determination by the Inner House of the Court of Session of any question as to the extent or effect of an alleged transfer.[7]

SUBSECTION (7).—*Further Powers.*

(i) *Powers as to Parliamentary Bills.*

1287. A county council has power to promote or oppose Provisional Orders or Bills in Parliament, with the consent of the Secretary for Scotland, but not to promote any Bill except a Bill for confirming a Provisional Order made under or in pursuance of the provisions of any Act of Parliament.[8] A resolution to promote or oppose must be passed by an absolute majority at a meeting of the council of which special notice has been given.[9]

(ii) *Powers to make By-laws.*

1288. The powers of previously existing authorities to make by-laws are among the powers transferred to the county council. The county council may make suitable by-laws for the administration of the affairs of the county, for the suppression of vagrancy, and for the prevention and suppression of nuisances, not already punishable in a summary manner by any Act in force;[10] and for the regulation of hackney carriages,[11] and of street collections for charity.[12]

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[1] 38 & 39 Vict. c. 17, and 13 & 14 Geo. V. c. 17. See EXPLOSIVES.

[2] 41 & 42 Vict. c. 49 ; 52 & 53 Vict. c. 21 ; 4 Edw. VII. c. 28 ; and 9 & 10 Geo. V. c. 29.

[3] 42 & 43 Vict. c. 19 ; 51 & 52 Vict. c. 19 ; 61 & 62 Vict. c. 60 ; 62 & 63 Vict. c. 35 ; and 63 & 64 Vict. c. 28. See INEBRIATES.

[4] 43 & 44 Vict. c. 35 ; 44 & 45 Vict. c. 51 ; 57 & 58 Vict. c. 24 ; 59 & 60 Vict. c. 56 ; 2 Edw. VII. c. 6 ; 4 Edw. VII. c. 4 ; 4 Edw. VII. c. 10 ; and 8 Edw. VII. c. 11. See ANIMALS.

[5] 20 & 21 Vict. c. 71, s. 26.

[6] 6 & 7 Vict. c. 36.

[7] 52 & 53 Vict. c. 50, s. 61.

[8] *Ibid.*, s. 56, as amended by 3 Edw. VII. c. 9, s. 2.

[9] 35 & 36 Vict. c. 91, as applied by s. 56 (*supra*).

[10] 52 & 53 Vict. c. 50, s. 57 ; see also *Eastburn* v. *Wood*, 1892, 19 R. (J.) 100 ; *Dunsmore* v. *Lindsay*, 1903, 6 F. (J.) 14 ; *Ronaldson* v. *Williamson*, 1911 S.C. (J.) 102.

[11] 8 Edw. VII. c. 62. s. 13.

[12] 6 & 7 Geo. V. c. 31, s. 5 (3).

(iii) *Miscellaneous Powers.*

1289. The county council may also adopt ss. 54 and 82 of the Burgh Police Act, 1903,[1] as altered by the Burgh Police Amendment Act, 1911,[2] relating to the sale of ice cream and places of public refreshment.[1] Secs. 408, 410, and 411 of the Burgh Police Act of 1892 relating to vagrants and beggars, and s. 430 of the same Act relating to the sale of coals, were made applicable to counties by s. 10 of the Act of 1908.[3] County councils may also enforce the provisions of the Rivers Pollution Prevention Acts, 1876 and 1893.[4] By the Act of 1908, powers were conferred on county councils to provide county buildings and dwellings for constables and road men;[5] to acquire land for any administrative purpose;[6] to provide, either alone or jointly with another authority, fire brigades;[7] and to accept transfers of private hospitals and sanatoria.[8] Power is also specifically given to erect guide-posts and direction notices.[9]

(iv) *Transfer of Powers by Secretary for Scotland.*

1290. The Secretary for Scotland may, by Provisional Order, transfer to a county council any of the powers, duties, and liabilities of (1) H.M. Privy Council, the Secretary for Scotland, the Board of Trade, or the Scottish Education Department, or any other Government department, which are conferred by or in pursuance of any statute, and appear to relate to matters arising within the county, or to be of an administrative character; (2) any powers, duties, and liabilities, arising within the county, of any public body, corporate or uncorporate (not being the corporation of a burgh, or the trustees of a public navigation or lighthouse trust, or a parish council, or an education authority), which are conferred by or in pursuance of any statute.[10]

(v) *Powers in Relation to Parish Councils.*

1291. The county council may divide any landward parish or landward part of a parish into parish wards,[11] and must provide for the election of parish councillors.[12] The county council may compulsorily acquire land for a parish council in certain circumstances.[13] The county council may lend to a parish council any money which the parish council are authorised to borrow, and for this purpose the county council may borrow.[14]

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[1] 3 Edw. VII. c. 33; *Lena* v. *Davidson*, 1913 S.C. (J.) 76; *Da Prato* v. *Partick Mags.*, 1907 S.C. (H.L.) 5; *Rossi* v. *Edinburgh Corporation*, 7 F. (H.L.) 85.

[2] 1 & 2 Geo. V. c. 51.

[3] 8 Edw. VII. c. 62, s. 10.

[4] 52 & 53 Vict. c. 55, applying 39 & 40 Vict. c. 75, and 56 & 57 Vict. c. 31.

[5] 8 Edw. VII. c. 62, s. 3.

[6] *Ibid.*, s. 5.

[7] *Ibid.*, s. 8.

[8] *Ibid.*, s. 15.

[9] 57 & 58 Vict. c. 58, s. 42 (4).

[10] 52 & 53 Vict. c. 50, s. 15.

[11] 57 & 58 Vict. c. 58, s. 13.

[12] *Ibid.*, s. 14

[13] *Ibid.*, s. 25.

[14] *Ibid.*, s. 28 (4).

(vi) *Miscellaneous Duties.*

1292. In addition to the foregoing powers and duties, county councils have in recent years been entrusted with a great variety of minor miscellaneous responsibilities which hardly admit of classification. The principal statutes under which the county council is the rural local authority, or by which specific administrative duties have been conferred upon the county council or district committee are the Electricity (Supply) Acts 1882 to 1922;[1] the Light Railways Acts 1896 and 1912, as amended by the Railways Act, 1921;[2] the Fertilisers and Feeding Stuffs Act, 1906; the Rats and Mice (Destruction) Act, 1919;[3] the Shops Acts, 1912 to 1921;[4] the Cinematograph Act, 1909;[5] the Allotments Acts, 1892 to 1922;[6] the Licensing (Scotland) Acts, 1903 to 1923;[7] the Old Age Pensions Acts, 1908 to 1924;[8] and the Barbed Wire Act, 1893.[9]

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[1] See ELECTRICITY.
[2] See RAILWAYS AND CANALS.
[3] 9 & 10 Geo. V. c. 72.
[4] See SHOPS.
[5] See THEATRES.
[6] See ALLOTMENTS.
[7] See LICENSING.
[8] See OLD AGE PENSIONS.
[9] See FENCES.

COURT MARTIAL.

See ARMED FORCES OF THE CROWN.

COURT OF EXCHEQUER.

See COURT OF SESSION; EXCHEQUER.

COURT OF JUSTICIARY.

See JUSTICIARY, HIGH COURT OF.

INDEX.

- **Company, 1.**
  - A. Part I.—*Introductory*—
    - Classification, 3.
      - Chartered companies, 3.
      - Common-law companies, 3.
      - Companies registered under the Companies Acts, 6.
      - Companies under the Companies Clauses Acts, 5.
    - Definition, 3.
    - Domicile, 7.
    - Jurisdiction, 8.
  - B. Part II.—*Companies under the Companies Acts, 1908 to 1917*—
    - Accounts, 115.
    - Agency, 133.
    - Allotment of shares, 75.
    - Articles, 25, 89.
    - Audit, 116.
    - Borrowing, 141.
      - Debentures and debenture stock, 145.
        - Debenture prospectus, 149.
        - Form and contents of instruments of security, 145.
          - Debentures, 145.
          - Debenture stock, 147.
          - Debenture trust deeds, 148.
        - Stamp duty, 148.
      - Power to borrow, 141.
      - Power to grant security for money borrowed, 143.
      - Registration of mortgages and charges, 149.
    - Brokerage, 30.
    - Calls, 68.
    - Capital, 29.
      - Application of capital, 47.
      - Cancellation of unissued shares, 36.
      - Consolidation and division of capital, 34.
      - Conversion of shares into stock, and reconversion, 35.
      - Increase of capital, 32.
      - Reduction of capital, 37.
        - With confirmation by Court, 39.
          - Applications to Court, 43.
            - Where creditors are concerned, 45.
            - Where creditors are not concerned, 44.
          - Order confirming reduction, 47.

- Company (*continued*).
  - B. Part II.—*Companies under the Companies Acts, 1908 to 1917* (*continued*).
    - Capital (*continued*).
      - Reduction of capital (*continued*).
        - Without confirmation by the Court, 38.
          - Accumulated profits, return of, 38.
          - Forfeiture and surrender of shares, 39.
          - Unlimited company, 39.
      - Reorganisation of capital, 36.
      - Subdivision of shares, 34.
      - Underwriting and brokerage, 30.
    - Debentures, 145.
    - Directors, 90.
    - Dividends, 119.
    - Forfeiture of shares, 86.
    - Formation and registration, 15.
      - Company limited by guarantee, 22.
      - Company limited by shares, 17.
        - Memorandum and articles of association, 17.
        - Private company, 19.
        - Public company, 19.
      - Fees, 15.
      - Limited company registered without the word limited, 23.
      - Registration office, 15.
      - Registration of unlimited company as limited, and re-registration of limited company, 16.
      - Registration under Part VII. of the Act, 16.
      - Unlimited company, 24.
    - In general, 9.
      - Application of Act of 1908 to existing companies without re-registration, 10.
      - Companies which may register under the Act of 1908 although not formed thereunder, 10.
      - Companies which must be registered under the Act of 1908, 11.
      - Interpretation, 10.
      - Repeal of former Acts, and savings from repeal, 9.
    - Lien on shares, 70.
    - Manager, 106.
    - Meetings, 102, 107.

Company (*continued*).
  B. Part II.—*Companies under the Companies Acts, 1908 to 1917* (*continued*).
    Membership, 58.
      Contract for membership, 59.
      Register of members, 61.
        Colonial registration, 66.
        Contents, 61.
        Custody and inspection, 64.
        Evidence of matters recorded, 63.
        Rectification, 64.
      Rights and liabilities of members, 67.
        Alteration of member's position and termination of membership, 71.
        Calls, 68.
        Lien on shares, 70.
    Memorandum and articles, effect of, 25.
    Mortgage (see Borrowing, Shares).
    Name and change of name, 27.
    Objects, alteration of, 128.
    Powers and liabilities of a company, 124.
      Crimes and offences, liability of a company for, 138.
      Exercise of a company's powers, 133.
        Agency, 133.
          Employment of agents by a company, 133.
          Liability of a company for the acts of its agents, 133.
        Arrangements and compromises, 138.
        Contracts, 134.
          Bills and notes, 137.
          Contracts before incorporation or commencement of business, 134.
          Contracts of companies in general, 136.
          Form of contracts—authentication of documents, 135.
        Notices to and by a company, 138.
      Objects, alteration of, 128.
        Principles, 128.
        Procedure, 130.
      Power to sue and defend, 138.
      Powers of a company, 124.
    Profits, 119.
    Promotion of companies, 12.
      Disclosure necessary to avoid liability, 13.
      Fiduciary relation of promoters to the company, 13.
      Illegal profits, remedy against promoter for, 14.
      "Promoter," meaning of the term, 12.
      Promoter's expenses, payment by company of, 15.
      Promoters' liability to each other, 15.
    Property, ownership and disposition of, 140.

Company (*continued*).
  B. Part II.—*Companies under the Companies Acts, 1908 to 1917* (*continued*).
    Prospectus, 48.
      Contents, 48.
      Definition, 48.
      Filing, 48.
      Misrepresentation and non-disclosure in prospectus, 52.
        Action for rescission, 52.
        Action of damages, 55.
        Rectification of the register and consequent relief, 54.
      Statement in lieu of prospectus, 57.
    Register of members, 61.
    Registered office, 27.
    Registration (see Formation and Registration).
    Regulation and management, 88.
      Accounts and audit, 115.
        Accounts, 115.
        Audit of accounts and auditors, 116.
        Inspectors, 118.
      Articles, alteration of, 89.
      Commencement of business, 114.
      Directors, 90.
        Appointment, 90.
        Liabilities, 97.
        Meetings of directors, 102.
        Powers and duties, 95.
        Qualification, 92.
        Remuneration, 93.
        Retirement, resignation, and removal, 103.
      Dividends and profits, 119.
      Meetings of members, 107.
        Evidence as to meetings, 113.
        General meetings, 107.
        How meetings are convened, 108.
        Proceedings at meetings, 109.
        Resolutions at meetings, 111.
      Returns to Registrar, 114.
      Secretary and other officers, 104.
        Auditors, 107.
        Managers, 106.
        Secretary, 105.
        Solicitor, 107.
      Special articles, 89.
      Table A, 88.
    Secretary, 105.
    Shares, 72 (see also Capital).
      Allotment and issue, 75.
        Allotment, 75.
        Issue, 76.
        Return of allotments and filing contracts, 76.
      Certificates of shares, 77.
      Forfeiture of shares, 86.
      Share warrants to bearer, 79.
      Surrender of shares, 87.

Company (*continued*).
  B. Part II.—*Companies under the Companies Acts, 1908 to 1917* (*continued*).
    Shares (*continued*).
      Transfer, transmission, and mortgage of shares, 80.
        Contract to sell shares, 80.
        Mortgages, 85.
        Transfer, 81.
        Transmission of shares, 84.
    Solicitor, 107.
    Table A, 88.
    Underwriting, 30.

Compensation, 151.
  Compensable debts in bankruptcy, 156.
    Application of general rules, 156.
    Balancing accounts in bankruptcy, 157.
    No concourse after sequestration, 156.
    Valuation of future and contingent debts, 159.
  Compensable debts in general, 154.
    Must be acquired *bona fide*, 154.
    Must be of the same kind, 154.
    Must both be liquid, 154.
    Must both be presently exigible, 155.
  Definition, 151.
  Method of effecting compensation, 152.
  Persons between whom compensation is competent, 160.
  Recompensation, 153.
  Secured debts, 153.
  Statutory bar of the plea, 166.

Completion of Title, 168.
  Completion of title by assignee of unfeudalised conveyance, 227.
    Competition between assignees, 235.
    Deduction of title, 232.
    Disposition by person uninfeft, 231.
    Infeftment by recording disposition along with assignation, 229.
    Infeftment by recording disposition along with instrument or notice, 228.
    Infeftment by recording notarial instrument or notice of title, 228.
    Infeftment of assignee of personal right by survivance, 230.
    Infeftment prior to 1858, 227.
    Statutory forms of assignation, 227.
  Completion of title by disponees, 213.
    Entry with the superior between 1845 and 1874, 213.
      By combined charter, 218.
      By confirmation, 213.
      By resignation, 215.
    Identification of disponee, 219.
      Conveyances in liferent and fee, 223.
      Descriptive disponees, 220.
      Dispositions to persons with different interests, 222.
      Identification of property, 224.
      Nominate conditional institutes, 221.

Completion of Title (*continued*).
  Completion of title by disponees (*contd.*).
    Implied entry, 218.
    Original vassal, 213.
  Completion of title by heirs, 206.
    Completion of title by heir of grantee of trust deed for creditors, 213.
    Completion of title to personal rights by survivance, 212.
    Infeftment Act, 1845, 206.
    Infeftment on decree of service, 211.
    Precepts and writs of *clare constat*, 207.
    Service of Heirs and Crown Charters Acts of 1847, 206.
  Completion of title by judicial assignees, 244.
    Liquidator of company, 245.
    Trustee in sequestration, 244.
  Completion of title of general disponee, 225.
  Completion of title of trustees and legatees, 235.
    Ex officio trustees, 238.
    Heir of sole or last surviving trustee, 237.
    Original trustees, 235.
    Trustees assumed or appointed in succession, 236.
  Completion of title to heritable securities, 246.
    Before 1845, 246.
    Between 1845 and 1847, 246.
    Between 1847 and 1868, 247.
    After 1868, 247.
  Completion of title to lands acquired compulsorily, 242.
  Completion of title to real burdens and ground annuals, 247.
  Completion of title to registered leases, 247.
  Completion of title to terce and courtesy, 247.
  Completion of title under decree of Court, 239.
    Adjudgers, 242.
    Beneficiaries in lapsed trust, 239.
    Trustees and factors appointed by the Court, 240.
    Under decree of division of common property, 242.
    Under decree of division of glebe, 242.
  Historical, 172.
    Base and public infeftment, 179.
    Burgage tenure, 183.
    Clare constat, precept of, 175.
    Combined charters, 182.
    Confirmation, entry by, 180.
    Entry with superior, 174.
    Investiture, proper and improper, 172.
    Resignation, entry by, 177.
    Sasine and infeftment, 172.
    Sasine, instrument of, 173.

Completion of Title (*continued*).
  Historical (*continued*).
    Sasine, precept of, 172.
    Service of heirs, 175.
    Symbolical delivery, 173.
    Tinsel of superiority, 176.
  Infeftment, 183.
    Clause of direction, 187.
    Direct registration, 184.
    Notarial instruments and notices of title, 188.
    Real rights by, 169.
    Real rights without, 170.
    Results of non-infeftment, 171.
    Sasine *ex propriis manibus*, 197.
    Sasine, instruments of, 183.
    Warrants of registration, 193.
  Service of heirs, 199.
    Character of heir, 199.
    Declaratory services, 204.
    Effect of decree of service, 202.
      General service, 203.
      Special service, 202.
    Liability of an heir for his ancestor's debts, 202.
    Service of heirs after 1847, 200.
    Services in trust, 205.
    Vesting in heirs, 205.
Composition Contract, 248.
  Application of provisions as to deeds of arrangement, 254.
  Cautioner for composition, 253.
    Acts which release cautioner, 253.
    Illegal preference to cautioner, 253.
    Rights of cautioner, 253.
  Composition contract in sequestration, 254.
  Conditions usually expressed, 249.
  Effect of discharge on cautioner for debtor, 252.
  Implied conditions, 249.
  Nature and constitution of extra-judicial composition contract, 248.
  Parties to the contract, 248.
  Proof of the contract, 250.
  Rights and obligations under the contract, 250.
    Debtor's rights under the contract, 252.
    Effect of misrepresentation or concealment by the debtor, 252.
    Illegal preferences, 251.
Compromise, 255.
  Compromise by company, 259.
  Compromise by trustees, 259.
  Compromise in bankruptcy, 258.
  Compromise of claim to workmen's compensation, 260.
  Proof of compromise, 256.
  Who may compromise, 257.
    Agents, 258.
    Capacity to compromise, 257.
    Counsel, 257.
    Parties, 258.
Compulsory Purchase, 261.
  Acquisition of Land (Assessment of Compensation) Act, 1919, 313.
    Assessment of compensation, 313.
    Costs and notice of claim, 315.
    Exclusion of official arbiter, 316.
    Procedure before official arbiter, 314.
    Review, 316.
    Summary of changes effected, 317.
  The Lands Clauses Acts, 263.
    Accommodation works, etc., 312.
    Acquisition of minerals, 290.
      Compensation under the mining code, 293.
      Mining code, 291.
      Substituted code for railways, 294.
    Acquisition of water, water rights, and servitudes, 288.
      Servitudes, 289.
      Water, 288.
    Application of compensation, 296.
      Expenses in connection with consigned money, 300.
      Persons under disability, 296.
      Recalcitrant and absent persons, 299.
    Apportionment between landlord and tenant, 307.
    Assessment, basis of, 287.
    Assessments on undertaking, 311.
    Compensation, assessment of, 272.
      Arbitration, 273.
      Jury trial, 275.
      Review of assessment, 278.
      Sheriff's award, 273.
      Valuation in case of absent parties, 277.
    Conveyances, 301.
    Entry on lands, 303.
      Conditions of entry, 303.
      Entry before compensation fixed, 305.
      Entry for purposes of survey, etc., 304.
      Entry of consent, 304.
      Entry on payment, 304.
      Penalties for unlawful entry, 306.
      Warrant to take possession, 306.
    Interests omitted to be purchased, 308.
    Interests to be compensated, 278.
      Bondholders, 281.
      Owners, 279.
      Persons having rights of commonty, 283.
      Persons injuriously affected, 284.
      Superiors and creditors, 282.
      Tenants, 279.
    Intersected lands, 306.
    Landlord and tenant, apportionment between, 307.
    Minerals, 290.
    Notice to treat, 268.
      Abandonment of notice, 271.
      Nature and effect of notice, 268.

Compulsory Purchase (*continued*).
  The Land Clauses Act (*continued*).
    Notice to treat (*continued*).
      Part of a house under section 90, 270.
      Persons entitled to receive notice, 271.
      Requisites of notice and service, 270.
    Price, ascertainment of, 272.
    Proceedings under the Act, 311.
    Purchase by agreement, 265.
      Lands for extraordinary purposes, 266.
      Persons under disability, 265.
      Rights arising on abandonment of undertaking, 267.
    Purchase otherwise than by agreement, 267.
      Subscription of capital, 267.
      Other limitations on exercise of compulsory powers, 268.
    Railways, 294.
    Scheme and objects of Acts, 263.
    Servitudes, 289.
    Superfluous lands, 308.
    Water, 288.
    Water rights, 288.
  Statutory modifications of the Clauses Acts, 318.
    Admiralty lands and works, 319.
    Allotments, 327.
    Defence Acts, 318.
    Defence of the Realm (Acquisition of Land) Acts, 319.
    Development Commissioners, 320.
    Forestry, 320.
    Housing, 323.
      Acquisition of land for houses, 324.
      General provisions, 325.
      Obstructive buildings, 323.
      Reconstruction and improvement schemes, 324.
    Land settlement, 321.
    Local authorities, 321.
      Education authorities, 322.
      Parish councils, 322.
      Public health authorities and county councils, 322.
      Town councils, 321.
      Other authorities, 323.
    Military Lands Act, 318.
    Post Office, 319.
    Small Landholders Acts, 321.
    Town planning, 325.
    Trading undertakings, 327.
Conditio si sine liberis, 330.
  Conditio si institutus sine liberis decesserit, 335.
    Accretion, 342.
    Bequests by persons in *loco parentis,* 339.
    Bequests to conditional institutes, 339.
    Distribution of bequest where *conditio* admitted, 341.
Conditio si sine liberis (*continued*).
  Conditio si institutus sine liberis decesserit (*continued*).
    Excluded by *delectus personæ,* 340.
    Object of bequest, 337.
    Parent must be instituted, 338.
    Subjects to which applicable, 336.
  Conditio si testator sine liberis decesserit, 331.
    Conditions of its application, 331.
    How excluded, 332.
      Effect of lapse of time after date of will, 333.
      Predecease of child born after date of will, 333.
      Result of applying *conditio,* 334.
      Where children provided for in marriage contract, 334.
      Written evidence of intention to exclude, 332.
Condition (see Contract).
Confidential Communications, 344.
  Communications between a client and his legal adviser, 347.
  Communications between husband and wife, 354.
  Communications between a medical man and his patient, 353.
  Communications between a party and persons in his employment, 345.
  Communications between parties on the same side of a cause, 344.
  Communications between and to public officials, 356.
  Communications between spiritual adviser and penitent, 352.
  Communications made to and by men of skill and business other than legal advisers, 351.
  Judges, jurors, and arbiters, 355.
    Arbiters, 356.
    Judges of inferior Courts, 355.
    Judges of the Supreme Courts, 355.
    Jurors, 356.
  Members and officers of the Houses of Parliament, 355.
Confirmation of Executors, 360.
  Additional inventories and confirmations, 376.
    Additional inventories, 376.
    Additional confirmations, 376.
      Confirmation *ad non executa,* 377.
      Confirmation *ad omissa vel male appretiata,* 376.
      Corrective inventories, 377.
  Caution for executors-dative, 372.
    Restriction of caution, 373.
    Who may be cautioner, 374.
  Debts, 371.
  Dominion grants, 379.
  Executor-creditor, confirmation as, 384.
    Creditors of the next-of-kin, 385.
    Equalisation of creditors, 384.

Confirmation of Executors (*continued*).
- Executor-creditor, confirmation as (*contd.*).
  - How excluded, 384.
  - Special features, 384.
- Executors-dative, confirmation of, 367.
  - When necessary, 367.
  - Who are entitled to be appointed, 367.
- Executors-nominate, confirmation of, 363.
  - Assumed and nominated trustees, 366.
  - Executors expressly appointed, 364.
  - Implied appointment, 364.
  - Specialties of appointment, 366.
  - The Executors Act, 1900, 364.
- Funeral expenses, 371.
- Inventory and confirmation, contents of, 368.
  - Estate to be included, 368.
  - Extent of title obtained, 369.
  - Valuation of estate, 369.
- Jurisdiction, 361.
  - Domicile, 361.
  - Holograph wills, proof of, 363.
  - Who may practise in Commissary Courts, 363.
- Oath, 370.
  - Before whom to be taken, 370.
  - By whom to be taken, 370.
  - Contents of oath, 371.
- Resealing in Scotland of English and Irish grants, 378.
  - English grants, 378.
  - Irish Free State grants, 379.
  - Northern Irish grants, 379.
- Resealing of Scottish confirmations, 377.
  - Resealing in England, 377.
  - Resealing in the Irish Free State, 378.
  - Resealing in Northern Ireland, 378.
- Small estates, 374.
  - Ascertainment of amount of estate, 375.
  - General, 374.
  - £300 limit under Inland Revenue Act, 1881, 375.
  - Procedure, 376.
- Title without confirmation, 380.
  - Preliminaries, 380.
  - Privileged estates, 381.
  - Power of executors unconfirmed, 380.
  - Substitutes for confirmation, 380.
- Trust funds, transmission of, 381.
  - Common law methods, 381.
  - Statutory methods, 382.
    - English and Irish estates, 383.
    - Executors (Scotland) Act, 1900, s. 6, 382.
    - Executors (Scotland) Act, 1900, s. 7, 383.
    - Trusts Act, 1921, 383.

Confirmation (see Completion of Title).

Confusio, 386.
- Application of the principle, 387.
  - Apparent heir and heir liable *preceptione hereditatis*, 388.

Confusio (*continued*).
- Application of the principle (*continued*).
  - Cautionary obligations, 389.
  - Extinction of the obligation, 387.
  - Heir of entail, 388.
  - Heritable and moveable debts, 389.
  - Heritable bonds, 389.
  - Landlord and tenant, 390.
  - Servitudes, 390.
  - Suspension of the obligation, 387.
- Definition and scope, 386.

Conjunct Rights, 393.
- Husband and wife, 393.
- Parent and child, 395.
- Strangers, 398.

Conquest, 400.
- Conquest in heritable succession, 400.
  - Destinations to heirs, 402.
  - Effect of Conveyancing Act, 1874, 400.
  - Fees of conquest, 400.
  - Heirs of conquest, 401.
  - Old law, 400.
- Conquest in marriage-contract provisions, 402.
  - Clauses in ordinary form, 402.
  - Clauses in special form, 404.

Consensus in idem (see Contract).

Consideration (see Contract).

Consignation (see Compulsory Purchase).

Consolidation, 407.
- Destination, 412.
- Double superiority titles, 412.
- Effects of consolidation, 411.
  - Title, 411.
- Entailed superiority, 413.
- Heritage and conquest, 413.
- Minute, 410.
- Over-superior's position, 413.
- Prescription, 409.
- Resignation, 408.

Constitution, Action of, 415.

Constitutional Law, 416.
- British Parliament and Colonial Legislatures, 421.
  - Colonial Laws Validity Act, 1865, 421.
  - "Dominions," the, 421.
  - India, 422.
- Definition, 416.
- Judiciary, the, 423.
  - Appeals to King in Council, 425.
  - Colonial Courts, 424.
  - Relation of Crown to Judiciary, 423.
- Legislation, 418.
  - Money Bills, 418.
  - "Other Bills," 419.
- Sources, 416.
- Sovereignty of Parliament, 420.
- United Kingdom, 417.

Contempt of Court, 428.
- Breach of interdict, 435.
  - Petition and complaint, 435.

Contempt of Court (*continued*).
  Breach of interdict (*continued*).
    Procedure in petition and complaint, 436.
    Punishment, 438.
    Review, 438.
  Defiance or wilful non-observance of decrees of the Court, 432.
  Definition, 428.
  Improper attempts to influence the course of justice, 430.
  Insolent or unseemly behaviour in Court, 428.
  Jurisdiction, 433.
  Procedure, 433.
  Punishment, 434.
  Review, 434.
Contra bonos mores (see Contract).
Contract, 441.
  Analysis of contract, 442.
  Assignation, 455.
  Capacity to contract, 447.
  Communication of intention: offer and acceptance, 449.
  Consent, 448.
  Consideration: subject-matter: legality of object, 451.
  Constitution, 443.
  Definition, 441.
  Frustration, 457.
  Locus pœnitentiæ: rei interventus: homologation, 446.
  Operation of contract, 454.
    Assignation, 455.
    Privity of contract, 454.
  Proof, 443.
  Proper law of the contract, 460.
  Reality and completeness of consent: void and voidable contracts, 448.
  Rei interventus, 446.
  Repudiation, rescission, and frustration, 457.
  Specific performance, 456.
  Types of contract: constitution and proof, 443.
  Variation of contract, 451.
  Void and voidable contracts, 448.
Contributory (see Company).
Contumacy (see Contempt of Court).
Conventional obligation (see Contract).
Copyright, 464.
  Artistic copyright, 482.
    Architects' works, 484.
    Artistic works generally, 483.
    Book illustrations, 483.
    Definitions, 482.
    Designs, 484.
  Assignation of copyright, 492.
  Colonial copyright, 522.
  Definition of copyright, 466.
  Designs, 484.
  Dramatic and musical copyright, 479.
    Cinematograph productions, 481.
    Generally, 479.

Copyright (*continued*).
  Duration of copyright, 489.
    Compulsory licences, 492.
    Exceptions, 489.
    General period, 489.
    Right to reproduce on payment of royalty, 490.
  First owner of copyright, 485.
  Historical sketch, 464.
  Importation of copies, 510.
  Infringement of copyright, 496.
    Artistic copyright, 504.
    Dramatic and musical copyright, 501.
      Liability of proprietor, lessee, or occupier of place of entertainment, 503.
      Performance in public, 502.
      Reproduction in material form, 501.
    Generally, 496.
    Literary copyright, 498.
      Colourable imitations, 501.
      Exceptions to author's monopoly, 499.
      Public performance, 500.
      What amounts to infringement, 498.
  International copyright—the Copyright Union, 524.
    Authors protected, 525.
    Cinematographs, 529.
    Duration of copyright, 527.
    Enforcement of protection, 529.
    Mechanical reproduction, 528.
    Performing rights, 528.
    Protection under British Copyright Act, 1911, 530.
    Works protected, 526.
  Joint works, 511.
    Duration of copyright, 512.
    Generally, 511.
  Literary copyright, 472, 498.
    Crown copyright, 477.
    Fraudulent works, 474.
    Generally, 472.
    Immoral, blasphemous, or libellous works, 475.
    Maps, charts, and plans, 475.
    Newspapers and other collective works, 476.
    Titles and names, 474.
    University copyright, 479.
  Mechanical contrivances, 516.
    Control of mechanical reproduction, 516.
    Copyright in mechanical contrivances, 521.
    Foreign works, 521.
    Reproduction on payment of royalties, 517.
  Musical copyright, 479.
  Publication, 470.
  Remedies for infringement, 505.
    Civil remedies, 505.
    Summary remedies, 507.

Copyright (*continued*).
  Subjects of copyright, 467.
  Transmission of copyright, 492.
    Assignation, 492.
    Generally, 492.
    Licences, 494.
    Limitation of assignability, 495.
  United States of America, copyright with, 531.
  Unpublished works, 467.
    Generally, 467.
    Lectures, 470.
    Letters, 469.
  Works in existence before 1911 Act, 513.
Corporation Duty, 536.
  Administrative provisions, 539.
  Exemptions, 537.
  Property subject to duty, 536.
Corporations, 541.
  Constitution of corporations, 543.
  Dissolution, 547.
  Historical, 542.
  Liabilities, 546.
  Powers, 544.
Councillor (see County Council).
Counter-claim (see Contract).
County clerk (see County Council).
County Council, 551.
  Area of government, 559.
    Alteration of boundaries, 560.
    Area, 559.
    Boundaries, 559.
    Electoral divisions, 560.
    Financial adjustments, 561.
  Commissioners of supply, 553.
    Historical, 553.
    Powers and duties, 555.
    Qualifications, 555.
  Constitution of the county council, 557.
    Composition of council, 557.
    Electorate, 559.
    Qualification for a councillor, 558.
  Districts and district committees, 562.
    Districts, 562.
    District committees, 562.
  Finance, 573.
    Accounts and audit, 578.
    Borrowing, 576.
    Budget, 574.
    County fund, the, 573.
    Expenditure, 573.
    Rates, 574.
    Rating in burghs, 576.
    Revenue, 573.
County Council (*continued*).
  Joint committees, 567.
    Composition, 567.
    Costs, 568.
    Proceedings and powers, 568.
  Officers, 569.
    Appointment and dismissal, 569.
    Assessor, 570.
    County clerk, 569.
    Medical officer and sanitary inspector, 570.
    Officers of former authorities, 569.
    Returning officer, 570.
  Police districts, 567.
  Powers and duties, 578.
    Powers and duties transferred from commissioners of supply, 579.
    Powers and duties transferred from county road trustees, 580.
    Powers and duties transferred from justices of the peace, 581.
    Powers and duties transferred from local authorities under the Contagious Diseases (Animals) Acts, 580.
    Powers in relation to public health, 581.
    Further powers, 582.
      Miscellaneous duties, 584.
      Miscellaneous powers, 583.
      Powers as to parliamentary Bills, 582.
      Powers to make by-laws, 582.
      Powers in relation to parish councils, 583.
      Transfer of powers by Secretary for Scotland, 583.
  Proceedings, 570.
    Committees, 571.
    Convener and vice-convener, 571.
    Disqualification from voting, 571.
    Meetings, 570.
  Special districts, 564.
    Additional powers available in special districts, 566.
    Financial provisions affecting special districts, 566.
    Local sub-committees, 566.
    Special drainage and water supply districts, 564.
    Special lighting districts, 565.
    Special scavenging, etc., districts, 566.
    Statutory provisions, 564.
  Standing joint-committee, 561.
Lands Clauses Act (see Compulsory Purchase).

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